Supreme Court of the United States

OCTOBER TERM, 1961

No. 74

FEDERAL TRADE COMMISSION, PETITIONER

vs.

HENRY BROCH AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

[fol. A]

Before

FEDERAL TRADE COMMISSION

Docket No. 6484

In the Matter
of
Henry Broch and Oscar Adler
copartners trading as
HENRY BROCH & COMPANY

APPEAL BRIEF FOR RESPONDENTS—May 31, 1957

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[fol. 1] PRELIMINARY STATEMENT

This case concerns a novel interpretation extending the Brokerage Clause of the Robinson-Patman Act beyond its Congressionally intended limitations so as to thwart price bargaining in food distribution at the expense of the consumer and the public interest.

The central issue is whether Section 2(c) of the statute, the so-called Brokerage Clause, guarantees permanently fixed rates of commission to brokers which may not be reduced by a seller even when compelled to lower his own price to a customer in order not to lose a valuable sale. The Initial Decision now under review penal-[fol. 2] izes an independent food broker for accepting a smaller commission at the seller's behest in such a situation. This unprecedented holding creates a new and potent legal instrument to block the normal process of price bargaining between buyer and seller, even where no discriminatory treatment among competing customers appears.

Such a construction departs radically from the legislative purpose of the Brokerage Clause in light of the prevalent evils at the time of its enactment: to declare *per se* illegal those underhanded transactions *by sellers* who *disguised* price discriminations to *favored buyers* as spurious "brokerage" payments for the buyers' benefit, so as to force all price differentials out into the open to be judged by the flexible price discrimination provisions in Section 2(a). That Congressional design is perverted in the case at bar. Here a *straight and open* price quotation by the seller stands condemned as an automatic Section 2(c) offense *on the part of the unwitting broker* who had to take a smaller commission or lose the deal.

STATEMENT OF THE CASE

A. *The Proceedings*

The Commission on January 11, 1956 issued a complaint charging respondents with violations of Section 2(c) of the amended Clayton Act. According to the [fol. 3] complaint, respondents "granted and allowed" a buyer approximately 60% of brokerage commissions

"paid" them by a seller principal for their services. More specifically, the complaint alleged that respondents in connection with a specified sale of food products successfully "requested" the seller to lower its established price to the buyer and "to recoup" for himself in part by deducting about 60% of their normal brokerage commission of 5%. (Cplt. par. 4.)

Respondents denied the essential allegations of the complaint and denied any liability under the Act.

Hearings were held before the Examiner on various dates between May 8, 1956, and October 3, 1956, at Chicago, Illinois, and Pittsburgh, Pennsylvania. The oral deposition of the manager of the seller firm was taken on August 6, 1956, at Kentville, Nova Scotia, before a Notary Public, with the Hearing Examiner present as an observer. This deposition was made a part of the record as an exhibit on behalf of respondents in lieu of being read into the record.

At the close of the evidence, proposed findings of fact, conclusions of law and order, together with supporting memoranda, were filed by counsel for both sides. The Hearing Examiner on February 26, 1957 filed his Initial Decision adjudging a violation of Section 2(c) and accordingly entering an order to cease and desist.

[fol. 4] B. *The Basic Facts*

So far as pertinent to this appeal, the basic facts as reported in the Initial Decision are:

Respondents Henry Broch and Oscar Adler are copartners trading as Henry Broch & Co., with their main office and place of business at 1525 E. 53rd Street, Chicago, Illinois. Respondents function as independent sales representatives or brokers by negotiating the sale of frozen foods, frozen fruits, fruit juices, and other food products for about twenty-five seller principals. These compensate respondents by commissions computed as a specified percentage of sales price—ranging from 2% to 5%, and averaging about 3%. Sales by respondents are negotiated "subject to confirmation" by the sellers, and no commission is due until after the buyer has paid.

The controversy at bar originates in a sale of apple concentrate negotiated by respondents in late 1954 for Canada Foods, Ltd., of Kentville, Nova Scotia, an apple processor, with the J. M. Smucker Company of Orrville, Ohio, a manufacturer of apple butter and preserves. In early October of 1954, Canada Foods notified respondents as well as Tenser & Phipps, another broker representing Canada Foods in Pittsburgh, Pennsylvania, that the price for the 1954 pack of apple concentrate was $1.30 per gallon in fifty-gallon steel drums. In subse-
[fol. 5] quent negotiations, carried on independently with Tenser & Phipps and respondents, the purchasing agent for Smucker insisted on a lower price. In fact, he expressly offered to take about 500 drums, an unusually large lot, at $1.25 per gallon from Canada Foods, suggesting that similar concentrate was available at this price from another source. Canada Foods was thereafter advised of Smucker's tender by both Tenser & Phipps and by respondents.

In the ensuing discussions with Tenser & Phipps, Canada Foods insisted that it could not afford to reduce its price below $1.30 unless coupled with some downward adjustment of the broker's commission.[1] Tenser & Phipps declined to adjust its commission, and instead addressed a letter informing the prospective purchaser that "We could confirm the order at the price of $1.25, but we are very much afraid that we would be right in the way of the Robinson-Patman Act and we might find our names in print." (I.D. p. 8.)

After taking respondents' transmittal of the Smucker offer of $1.25 under advisement for a day, Canada Foods notified respondent on October 27 that it "would be will-
[fol. 6] ing to make the sale at $1.25 per gallon, provided that Broch would agree to reduce his commission from 5 per cent to 3 per cent." (I.D. p. 10.) According to the Examiner, respondent "agreed to [this] proposal and then telephoned [Smucker's purchasing agent] to

[1] There is considerable doubt as to the accuracy of this finding by the Examiner, based on testimony by Phipps which is flatly contradicted by Koldinsky, Canada Foods' manager. (*Compare* Depos. pp. 10, 19; with Tr. 100-101.) See note 2 *infra*.

advise him that his principal had agreed to sell at $1.25 per gallon, due to the large size of the order." (I.D. p. 10.)

When thereafter instructed by Canada Foods to suspend all sales of apple concentrate temporarily, Tenser & Phipps expressed its chagrin at the lost deal with Smucker, again made a record by citing the Robinson-Patman Act, and asserted its reluctance "to work with unclean hands." (I.D. p. 10.)

C. *The Decision under Review*

On the basis of these cardinal facts, the Examiner ruled that the price reduction to Smucker by Canada Foods, located in Canada beyond the Commission's jurisdiction, placed *respondents* in violation of Section 2(c). The Examiner acknowledged, but dismissed as immaterial, that *no proof* supported the complaint's allegations that respondents as brokers originated the transaction by "requesting" Canada Foods to lower its price and "to recoup" the reduction out of their brokerage commission. (Cf. Cplt. par. 4 with I.D. p. 22.) Nevertheless he viewed Canada Foods' price quotation to Smucker as [fol. 7] comprising an unlawful "allowance or discount in lieu of commission or brokerage," and fastened Brokerage Clause liability on the respondents. (I.D. pp. 23-24).

Questions Presented

Section 2(c), the so-called Brokerage Clause of the Robinson-Patman Act, in pertinent part provides:

> "That it shall be unlawful for any person * * * to pay or grant * * * anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof * * * either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is granted or paid." 15 U.S.C. § 13(c) (1952).

This appeal chiefly concerns the serious legal issues presented even under the Examiner's version of the facts hostile to respondents:[2]

The basic legal questions before the Commission are:

(1) Whether Section 2(c)'s ban on commissions by a seller "to the *other party*" or the intermediary of the *other "party"* also imposes a liability on an independent seller's broker.

[fol. 8] (2) Whether an independent broker's acquiescence in a smaller commission at the seller's behest can be deemed a *"payment to" the "other party"* in the transaction *by the broker.*

(3) Whether an outright price reduction not directly related to a given brokerage commission in conception or size nevertheless constitutes an allowance "in lieu of brokerage."

(4) Whether the paramount public interest is fostered by a formal proceeding based on an isolated transaction of *de minimis* scope generating a purely private grievance between a respondent and a disgruntled rival; and whether it is in the public interest to construe the Brokerage Clause to inhibit price bargaining by creating a privileged sanctuary for brokerage commissions sheltered by law from the normal competitive stresses of the market.

Argument

A. *Section 2(c) Enacts No Liability for Independent Sellers' Brokers*

The text as well as the legislative purpose of the Brokerage Clause confirm that Congress sought to interdict only discriminatory practices *on the part of sellers and buyers,* without jeopardizing the hapless broker whom the law aimed to protect.

[fol. 9] The basic objective of Section 2(c) was to abolish the practice, prevalent in the years prior to 1936, of sellers granting price discriminations to favored cus-

[2] Respondent of course does not waive its rights to contest the Examiner's findings on controverted facts.

tomers disguised as payments to "dummy brokers" or other "bogus" entities established for the buyer's benefit.[3] Besides prejudicing those customers not accorded comparable privileges, such arrangements with large buyers were also feared to starve independent brokers out of existence. The Brokerage Clause of the Robinson-Patman Act implements the Congressional concern with that technique for masking price differentials as broker's fees.

Understandably enough in light of this objective, the text of Section 2(c) does not inflict legal liabilities on those independent brokers whom Congress wished to preserve. To be sure, Section 2(c) nominally refers to [fol. 10] payments by "any person," rather than by sellers and buyers only. But to consider an independent seller's broker as a "person" under this provision makes nonsense of it. For it would then prohibit "any [broker]" from paying or granting a "commission, brokerage, or other compensation" etc. "either to the *other party*" or to the intermediary of that *other "party"* to the transaction. A *broker* paying "commissions" or "brokerage" is queer enough. But, above all, since an independent broker by definition cannot fuunction as a "party," he could not conceivably be reached by a ban on concessions to *other* parties.

Rather, the prohibition in Section 2(c) is best understood in its most natural meaning: as condemning cer-

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[3] As explained by Senator Logan, "In order to evade the provisions of the Clayton Act, however, it was found that while direct price discrimination could not be indulged in, the buyer, if he were sufficiently powerful, could designate someone and say, 'That is my broker.' Perhaps it was a clerk in his office. Perhaps it was a manager of a store. Perhaps it was a subsidiary corporation organized for the purpose. However, the buyer would say to the seller, 'You must sell through that man, and you must pay him a certain percentage or amount of brokerage'; and when the so-called broker or dummy broker received what was paid him, he turned it over to the buyer, and in that way a price discrimination was brought about." 80 Cong.Rec. 6281-82 (April 28, 1936). See also 80 Cong.Rec. 3114, 7759-60 (1936); and Hearings before the House of Representatives Judiciary Committee on Bills to Amend the Clayton Act, 74th Cong., 1st Sess., pp. 37, 218, 258 (1935).

tain discriminatory transactions between sellers and buyers who are "party" to a transaction. Thus, a "person" within the meaning of Section 2(c) is either the purchaser or the seller[4]—but not a broker.

[fol. 11] The legislative history equally refutes any liability for independent seller's brokers in Section 2(c). Not a line in the voluminous hearings and debates preceding enactment even hints that *anyone other than a seller* can incur liability for paying illicit "brokerage" to the buyer side. Rather, as explained by the draftsman of the Patman bill, the Brokerage Clause "prohibits the payment of brokerage to an intermediary by any *party* to the transaction other than the one for whom the service is rendered."[5] Corroborating this understanding, the Report of the House Judiciary Committee on the bill delineated the statutory ban on brokerage commissions thus:

> "It prohibits its allowance *by the buyer* direct to the seller, or *by the seller* direct to the buyer; and it prohibits its payment *by either* to an agent or

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[4] No significance attaches to use of "person" rather than some more descriptive noun in Section 2(c). The same term "person" introduces Section 2(a), 2(e), and 2(f) as well, and in each instance refers only to the buying and selling parties in a commercial transaction.

Contrariwise, when Congress wished to extend liability beyond the immediate buyer-seller parties, it utilized more embracing terminology. For example, Section 3, the criminal provision of the Robinson-Patman Act, reaches any "person" who is "a party to" or may "assist in" an illegal transaction. 15 U. S. C. § 13a (1952).

[5] Hearings, *supra* note 3, at 217. (Emphasis added throughout unless otherwise indicated.) Mr. Teegarden also depicted the vice at which the provision was aimed: "Where A. & P. or another firm comes up to a manufacturer's door and says, 'Here I am, a large buyer', that manufacturer does not need to engage a broker to find him a market. The brokerage function is not present there. And when A. & P. says, 'I will buy from you if you sell me through my brokerage concern and pay the brokerage which I will drain off in dividends', the brokerage function is being prostituted for the reaping of an unfair price concession. That is what it amounts to. That is the evil which this brokerage clause will prohibit." *Id.* at 218.

> intermediary acting in fact for or in behalf, or subject to the direct or indirect control, of the other."[6]

[fol. 12] That consensus prevailed likewise in the floor debates prior to enactment. Senator Logan, who piloted the bill through the Senate, explained that the provision "forbids the payment or allowance of brokerage either to the *other principal party,* or [its] intermediary";[7] and provides that "no buyer shall engage in this trick brokerage practice whereby a rebate may be made *by the seller.*"[8] And Representative Patman assured the House that the bill would "prohibit one party from bribing the representative of the other under the guise of brokerage allowances or commissions."[9] Above all, Representative Utterback, the Chairman of the Senate-House Conferees, analyzed the finalized bill immediately preceding enactment in the following comprehensive detail:

> "If an intermediary is employed, and is in fact acting for or under the control of the buyer, then *the seller cannot pay* him. Or if he is acting for or under the control of the seller, then *the buyer cannot* pay him. And where sales are made from buyer to seller, in the nature of the case no brokerage services are rendered by either, and no payment or allowance on account thereof can be made by *either party* to the other."[10]

[fol. 13] If Congress in Section 2(c) undertook to expose independent brokers to legal liability, as the Commission's staff in the instant case maintains, its failure to utter any indication of that purpose in the voluminous hearings and debates is astonishing indeed.[11]

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[6] H.R. Rep. 2287, 74th Cong., 2d Sess., p. 15 (1936).

[7] 80 Cong.Rec. 3114 (March 3, 1936).

[8] 80 Cong.Rec. 6281-82 (April 28, 1936).

[9] 80 Cong.Rec. 7759-60 (May 21, 1936).

[10] 80 Cong.Rec. 9418 (June 15, 1936).

[11] The interpretation espoused by the Initial Decision musters some ambiguous smatterings which fail to support the crucial point. Equivocal statements by a grocery manufacturers' associa-

Moreover, the courts uniformly confine Section 2(c) liability to payments by *sellers* to buyers. The Court of Appeals in the *Quality Bakers* case construed Section 2(c) "to prohibit the payment of brokerage in any guise *by one party* to the other, or the other's agent." [12] And the *Southgate Brokerage* case declared that Section 2(c) "specifically forbids the payment of brokerage *by the* [fol. 14] *seller* to the buyer or the buyer's agent." [13] No court to date has ruled otherwise.[14]

In view of this universal consensus limiting 2(c) liability to illicit "brokerage" payments by *sellers* to buyers, adoption by the Commission of the Initial Decision in the instant case would mark a novel and radical departure.[15] Once anyone other than a seller or buyer is

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tion in hearings on an entirely different bill (S. 4171, which had no brokerage section) are of dubious relevance. (I.D. p. 17.) And statements that transactions involving "split brokerage" are illegal do not establish that an independent seller's *broker* is liable. Rather, the very sources cited by the Initial Decision (*id.* at 17-19) impose liability for "split brokerage" deals *on the seller*, not the broker. The rationale is that brokerage payments by a seller *to a broker* actually destined for the buyer are illegal because made to a person who in this respect is acting "for" the buyer. The sole contrary indication appears in Representative Patman's book published two years after passage of the Act. But Mr. Patman's private 1938 commentaries surely cannot create retrospective legislative history to contradict the Congressional understanding in 1935-1936 at the time of enactment. Compare Mr. Patman's 1956 views, p. 22 *infra*.

[12] *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 398 (1st Cir. 1940).

[13] *Southgate Brokerage Co.* v. *Federal Trade Commission*, 150 F. 2d 607, 609 (4th Cir. 1945).

[14] *Oliver Bros., Inc.* v. *Federal Trade Commission*, 102 F. 2d 763, 770 (4th Cir. 1939), cited by the Initial Decision, declares the *seller* liable in "split brokerage" dealings.

[15] The Initial Decision cites two proceedings holding independent sellers' brokers liable for their payment—to direct purchasers—of brokerage commissions ordinarily due to their sub-brokers in comparable transactions. *W. E. Robinson & Co.*, 32 F. T. C. 370 (1941); *Custom House Packing Corp.*, 43 F. T. C. 164 (1946). Neither case constitutes a precedent as an adjudication, for the respondents waived their defenses and consented to orders. On

deemed a "person" subject to the Robinson-Patman Act, a sweeping vista of hitherto unsuspected consequences might unfold. Any other intermediary—whether a broker, salesman, factor, advertising agency or medium—might face legal risks as a "person" chargeable with "inducing" price discriminations within the meaning of Section 2(f); or "contributing" to the furnishing of discriminatory services under Section 2(e).

[fol. 15]

B. *The Brokerage Clause Reaches Only Illicit Grants DIRECTLY to Buyers*

Even if independent sellers' brokers were technically liable under Section 2(c), its specific bans on allowances directly *from grantor to grantee* cannot apply to the transaction alleged at bar. To acquiesce in a lower rate of commission by the seller is neither to "pay" not to "grant" a brokerage allowance on respondent *broker's* part, and in no event runs *to* the buyer in the transaction.

The explicit specificity of the Robinson-Patman Act precludes the unprecedented twist [16] whereby the Initial Decision arrived at a Brokerage Clause violation. Section 2(c) simply prohibits a respondent "to pay or grant" a forbidden consideration "*to* the other party" or his agent. To approximate that element of the statutory offense, the complaint alleged that respondent "requested" the seller to quote the purchaser a lower price, to be financed out of a smaller "brokerage" commission. (Cplt. par. 4.) Owing to the total failure of proof on this score, the Initial Decision equated the broker's acceptance of a

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the opposite side of the argument is the Commission's dismissal in *D. J. Easterlin*, 33 F. T. C. 1639 (1941), also charging unlawful payments by a broker.

At any rate, these administrative expressions are now superseded by the more recent appellate judicial declarations, *supra*.

[16] The consent orders entered in *W. E. Robinson & Co., supra* and *Custom House Packing Corp., supra*, concern orthodox face-to-face deals between grantor and grantee of the challenged payments.

lower commission with an "indirect payment" *by him to the buyer*. But unlike the overall prohibition in Section 2(a) on competitively inimical price discriminations—[fol. 16] "direct" as well as "indirect"—, the Brokerage Clause was drafted for the one auxiliary purpose of driving out into the open one particular subterfuge for disguised discriminations granted *by sellers to buyers or their fronts*.

The Examiner's "indirect payment" theory for pursuing *triangular transactions*—from broker, to seller, to seller, to buyer—not only ignores that legislative design,[17] but also renders redundant most of the text of Section 2(c). For if Section 2(c) barred "indirect payments" generally, no need would have existed for its intricate bans on payments "to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation [fol. 17] is granted or paid." Such deals would have been covered anyhow as "indirect payments" by the seller to the buyer—*IF "indirect" payments generally had been within the legislative intent*.

Without a doubt, incorporation by Congress of this "indirect payment" concept *might have* trimmed and

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[17] The Initial Decision excerpts a fractured sentence from a legislative report to the effect that Section 2(c) "prohibits the *direct or indirect* payment of brokerage" (I. D. p. 21)—omitting what Congress deemed an "indirect" payment. According to identical explanations in the Senate and House Judiciary Committee Reports, the Brokerage Clause strikes at "the practice of certain large buyers to demand the allowance of brokerage *direct* to them upon their purchases, *or* its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made." Payment by one party either *directly to another party* or *indirectly through his intermediary*, rather than the bizarre interpretation of the Initial Decision, is the relevant reference of the quoted excerpt. S. Rep. No. 1502, 74th Cong., 2d Sess., p. 7 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess., p. 15 (1936). See also *Biddle Purchasing Co.* v. *Federal Trade Commission*, 96 F. 2d 687, 693 (2d Cir. 1938).

beautified the dreary prose of Section 2(c).[18] But Congress preferred to enact a specific albeit verbose prohibition. And the Commission's delegated powers do not include plastic surgery.

Furthermore, a broker's acquiescence in a lower commission at the seller's request in no event can be deemed a payment or grant of an allowance *to the buyer*. Such a "constructive" payment *might* be conceivable if the broker on his own initiative directed the seller to turn over funds to the buyer, in the cloak of a spurious price re- [fol. 18] duction or otherwise. But that is not the situation in the case at bar. Contrary to the allegations of the complaint, the Initial Decision reported that the *seller called respondent* to advise of his willingness to quote a lower price "provided that Broch would agree to reduce his commission from 5 per cent to 3 per cent." (I.D. par. 15.)

Moreover, to construct a fictitious payment *to the buyer* from the broker's acceptance of a smaller commission invites preposterous results. If another broker entirely strange to the negotiations had from the outset agreed to operate on a 2% commission basis in rivalry with respondent or other brokers accustomed to 3%, *his* conduct might with equal illogic be condemned as entailing an "indirect grant" to the buyer—of the 1% which he failed to secure in the transaction.

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[18] Congress *could have* achieved this result in a host of ways illustrated by the terminology of other Robinson-Patman provisions. Most simply, Congress *might have* outlawed any illicit brokerage paid "either directly or indirectly," in harmony with the text of Section 2(a). Also, the law *might have* banned payments "for the benefit of" another party, in the vernacular of Section 2(d); or prohibited anyone from "contributing" to illegal brokerage, in the phrase of Section 2(e). Finally, per the text of the criminal Section 3, Congress *might have* forbidden anyone to "assist in" a "sale" or even "contract to sell" of the proscribed character.

The point is that Congress in Section 2(c) *chose not to* employ any of these drafting techniques for reaching the conduct challenged at bar. It is for this reason that the Initial Decision could not operate within the textual framework of Section 2(c), but had to resort to unauthorized improvisation.

Such a doctrine could only serve to freeze into law a uniform pattern of "brokerage" fees set always at the level of the highest commission, without regard for the welfare of the public which must ultimately defray the resultant swollen costs of distribution.

C. *Allowances "In Lieu of Brokerage" Must Causally Relate To Eliminated Brokerage Commissions*

At all events, a price reduction cannot constitute an allowance in "lieu of brokerage" within the meaning of Section 2(c) unless directly correlated with a brokerage [fol. 19] commission in both conception and amount. This is the rationale of the Commission's recent *Main Fish Company*[19] decision, which the Initial Decision at bar ignores and flouts.

Main Fish dismissed a Brokerage Clause complaint predicated on the rationale of the instant Initial Decision. In the case at bar, the Examiner purported to detect an illegal allowance "in lieu of brokerage" because respondents allegedly "contributed" to the price reduction quoted by the seller to the buyer. (I.D. p. 23.) But *Main Fish* held that the simultaneous presence of a reduced price and an eliminated "brokerage" fee could not generate a presumption that the lower price reflected an "allowance in lieu of brokerage." The Commission stressed in this connection that the "pricing variations were not shown to be arithmetically commensurate with the pattern of brokerage" in other transactions, and dismissed the complaint for want of that causal parallel.[20]

That holding is *a fortiori* dispositive here. Two vital factors destroy the requisite nexus between Canada Foods' price quotation to Smucker and the respondents' brokerage commission:

[fol. 20] In the first place, vital considerations other than respondents' acquiescence in a reduced commission animated the seller's unilateral decision to lower his price. For example, the Smucker Company's order concerned an unusually large shipment of apple concentrate, per-

[19] Dkt. 6386 (July 30, 1956).

[20] *Id.* at p. 3.

mitting various economies in handling, freight, and customs fees at the border.[21] Besides, Canada Foods was well aware of lower price offerings by competitors to this prospective customer which it would have to meet or lose the sale.[22] These elements influenced the seller's price quotation in material respects.

In addition to these independent contributory circumstances, Canada Foods' price reduction had scant relation to respondents' commission. The seller lowered its price from $1.30 to $1.25 per gallon of apple concentrate, while respondents acceded to a downward adjustment of their commission from 5 to 3%. Respondents' theoretical "loss" of 2% on a product priced at $1.30 a gallon amounted to 2.6¢—whereas the buyer secured a full 5¢ price reduction from Canada Foods.

Obviously a price cut almost double the amount of a "waived" brokerage commission and animated by a host [fol. 21] of independent commercial considerations can be deemed an "allowance in lieu of brokerage" only at a disregard of business realities as well as the controlling rationale of the *Main Fish* decision.[23]

Indeed, *Main Fish* and the instant Initial Decision cannot logically coexist. If a net price reduction constitutes an "allowance in lieu of brokerage" merely because the elimination of certain brokerage fees is one "contributing" factor, the *Main Fish* proceeding could not have been dismissed. For, though the price differential there at issue was not "arithmetically commensurate" with the eliminated brokerage commissions, they were doubtless a "contributing" factor in the lower prices quoted to buyers who saved the seller a brokerage fee.

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[21] See *e.g.*, Dep. pp. 4, 5, 6, 18, 21.

[22] *Id.* at p. 20.

[23] This is the manifest reasoning of the Commission's proceeding in *Fruitvale Canning Co.*, Dkt. No. 5989 (June 15, 1956), which adjudged price differentials in the context of eliminated brokerage commissions as illegal discriminations under Section 2(a) where the size of the price reductions exceeded the amount of the saved brokerage fees.

It is the *Main Fish* rationale of *conservative* application of Section 2(c) in *net price quotation cases* which should reign dominant in Robinson-Patman enforcement. Whatever the broader philosophic controversies over the Act as an instrument of economic progress in a dynamic [fol. 22] age, even its most dedicated disciples acknowledge the primacy of the flexible price discrimination bans of Section 2(a). According to a recent friendly Congressional Report under the auspices of Rep. Patman, "False brokerage qua brokerage is absolutely forbidden. False brokerage qua 'a naked quotation in price' does not fall into the 'masquerade' category; rather it falls into the trap deliberately set for it by the law. Discriminatory concessions which cannot disguise themselves as brokerage or 'allowances' are thus forced to to show their true character, and *to be measured by the sections of the law dealing with discrimination.*"[24]

By that standard as well as the *Main Fish* doctrine the transaction at bar should have been challenged, if at all, under Section 2(a) against the appropriate parties.[25] The immunity of Canada Foods from the Commission's process in Nova Scotia cannot excuse a strained statutory interpretation for dragging in a Chicago broker by the heels as a second-choice respondent.

[fol. 23] D. *This Case Thwarts Rather Than Fosters the "Public Interest"*

Whatever else, this case should be dismissed as contrary to the "public interest" that all Commission proceedings must subserve.[26]

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[24] Report of the House Small Business Committee on *Price Discrimination, The Robinson-Patman Act, and the Attorney General's National Committee to Study the Antitrust Laws*, H.R. 2966, 84th Cong., 2d Sess., pp. 97-98 (1956). Cf. also, "If the objective of 2(c) was to bring price discriminations into the open, then when they are brought into the open the validity of the differentials should be tested under 2(a)." Cyrus Austin, Discrimination in Practices, in *How to Comply with the Antitrust Laws*, pp. 174, 180 (CCH 1954).

[25] Cf. the *Fruitvale Canning* decision, note 23 *supra*.

[26] The "public interest" is an essential element in Clayton Act as well as Federal Trade Commission Act cases instituted by the

At the outset, this case concerns a wholly isolated transaction of *de minimis* dimensions. The record at bar is occupied exclusively with respondents' participation in a single challenged sale of apple concentrate by Canada Foods to Smucker in late 1954. The only alleged vice concerns respondents' acquiescence in a brokerage commission cut by the seller from 5 to 3%, in conjunction with his own price reduction from $1.30 to $1.25 per gallon. Accordingly, the nub of illegality is respondents' alleged "waiver" of commissions in the amount of 2.6¢ per gallon, totaling less than $1000 in all. The Commission has applied the *de minimis* principle to dismiss proceedings of far greater magnitude than this. *E.g., B. F. Goodrich Co.*, Dkt. 5677 (Jan. 22, 1954). For it neither promotes the "public interest" nor enhances the stature [fol. 24] of the Commission to hound trivia—particularly by resort to novel and dubious statutory improvisations.

No "public interest," moreover, can ever inhere in a private grievance between business rivals. This proceeding against respondents manifestly originated with the personal pique of another broker who muffed the deal which respondents closed. The Initial Decision with refreshing candor recounts the saga of Tenser & Phipps, the Pennsylvania broker who lost a sale and set out to win a lawsuit. The moment that Tenser & Phipps felt its fee slip away when its negotiations between Canada Foods and Smucker turned sour, it insinuated the Robinson-Patman Act into the picture. (I.D. pp. 8, 10.) With vindictive finesse and foresight, Tenser & Phipps kept an eye to the future, built a record by drafting pregnant correspondence—and emerged next as star witness for the prosecution on the appointed day.

Commission. *E.g., Argus Cameras, Inc.*, Dkt. 6199 (Oct. 20, 1954); *Bohn Aluminum & Brass Corp.*, Dkt. 5720 (May 20, 1955); *Sylvania Electric Products, Inc.*, Dkt. 5728, p. 1 (Sept. 23, 1954); *B. F. Goodrich Co.*, Dkt. 5677 (Jan. 22, 1954). For recent judicial dovetailing of the two statutes, see *Federal Trade Commission* v. *Reed*, 1957 CCH Trade Cases, par. 68,676 (7th Cir. 1957); *Menzies* v. *Federal Trade Commission*, 1957 CCH Trade Cases, par. 68,648 (4th Cir. 1957); *Federal Trade Commission* v. *Tuttle*, 1957 CCH Trade Cases, par. 68,669 (2d Cir. 1957).

But however deep Tenser & Phipps' chagrin at its bungled deal with Smucker, the "public interest" entrusted to the Commission does not embrace such picayune mercantile grievances or private vendettas. Rather, the Commission in deference to its paramount "public interest" responsibilities "must be ever vigilant against the possibility of its processes being used to further the private interest of any party." *Wilson Tobacco Board of Trade, Inc.*, Dkt. 6262 (April 25, 1956). When the "pri-
[fol. 25] vate character" of a controversy appears, a Commission proceeding is "not one in the interest of the public" and must be dismissed. *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 30 (1929).

Above all, the theory of the instant proceeding may thwart the "public interest" by stifling normal price bargaining in food distribution. The law of this case, in a nutshell, is that brokers' commissions are immune from adjustment in the course of negotiations for the sale of food products, since any reduction of such a commission in connection with a lower price is illegal *per se* under Section 2(c).[27] That doctrine, moreover, applies even *when the seller treats every customer alike.* A lower price across the board to all customers would in fact compound the violation, for each reduction to any customer would constitute a separate offense.

So construed, Section 2(c) operates to create a privileged sanctuary for brokerage commissions at the expense of the public. As illustrated by the "subtle" correspondence of Tenser & Phipps at bar (I.D. pp. 8, 10), the Brokerage Clause would serve as a bludgeon to coerce buyers and sellers any time their normal price bargaining imperiled a broker's fee. Actually, that risk would attend *any* reduction from a previous price quotation whenever
[fol. 26] a broker was on the scene. For *any* lower price will *always* entail a smaller *dollar amount* of commission, unless the broker's *percentage* rate is immediate-

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[27] While the Commission will not pass on the constitutionality of its governing statutes, a court might well hold that such an arbitrary application of Section 2(c) raised grave problems under the Fifth Amendment. Cf., *e.g.*, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

ly raised. The inevitable tendency of such a doctrine is to chill price bargaining and freeze brokerage commissions at artificially high levels. And when an important element in the cost of food distribution is immunized from the pressures of competition, the consumer's food bill in the end will pay the freight.

Such a perversion of the Congressional objective clashes with antitrust policy and flouts the "public interest." Comparable efforts to "stabilize" and rig brokerage commissions in other areas of the economy have been vigorously pursued as illegal restraints of trade under the Sherman Act. *E.g., United States* v. *National Association of Real Estate Boards*, 339 U.S. 485 (1950); *United States* v. *American Association of Advertising Agencies, et al*, 1956 CCH Trade Cases, par. 68,252 (S.D.N.Y. 1956); cf. *Sugar Institute* v. *United States*, 297 U.S. 553, 587-88 (1936). Trade restraints in the distribution of groceries surely do not occupy a preferred antitrust position. Cf. *National Food Brokers Association, et al*, Dkt. 6363 (Oct. 7, 1955).

Nor can it be said that Congress in Section 2(c) ordained what the Sherman Act forbids. Section 11 of the Clayton Act expressly declares that no Commission order "shall in any wise relieve or absolve any person from any liability under the antitrust Acts." And the statutory interpretation at bar, if not wholly untenable, is admittedly novel and entails the administrative interpolation of a purported legislative "omission." (I.D. p. 21; cf. p. 24.)

[fol. 27] But the Supreme Court has recently denounced strained interpretations of the Robinson-Patman Act which "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 63 (1953). The Court refused to construe the Act's "ambiguous language as putting the buyer at his peril whenever he engages in price bargaining." *Id.* at 73. Announcing a doctrine dispositive here, the Court held that "such a reading must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was pre-

sumably left in the areas of our economy not otherwise regulated." *Id.* at 73-74.

Conclusion

For the above reasons, respondents respectfully request that this proceeding be dismissed.

Respondents in conformity with Rule 3.23 of the Commission request opportunity for oral argument in the premises.

Respectfully submitted,

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May 31, 1957

[fol. 28] [File endorsement omitted]

[fol. 29] IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12305

HENRY BROCH & CO., PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition For Review Of Order Of Federal Trade Commission Upon Remand From The United States Supreme Court

MOTION TO SET ASIDE OR MODIFY COMMISSION ORDER FOR REASONS NOT CONSIDERED IN ORIGINAL OPINION—
Filed October 14, 1960

On June 6, 1960, the Supreme Court by a narrow 5-4 margin reversed this Court's decision of December 11, 1958, which held that a seller's broker is not covered by Section 2(c) of the Robinson-Patman Act, and remanded the case to this Court for further proceedings consistent with its opinion. 363 U.S. 166, *reversing*, 261 F.2d 725. On October 10, 1960, the Supreme Court denied a timely petition for rehearing.

Petitioner now moves the Court to set aside or modify the Federal Trade Commission's order for the reasons detailed below,* which were not considered by the Court's original holding on the threshold issue of whether Section 2(c) covered an independent seller's broker, and which are left open by the Supreme Court's remand.

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* These issues are comprehended within the original petition for review (J.A. 206).

[fol. 30] ORIGINAL PROCEEDINGS

On January 11, 1956, the Federal Trade Commission issued a complaint which charged that petitioner violated Section 2(c) of the Robinson-Patman Act by granting a part of his brokerage commission to a buyer in the form of a lower price for the seller's product in one specified transaction on behalf of a named seller to a named customer (J.A. 1-5). After administrative proceedings, the Commission found that petitioner, functioning as broker for Canada Foods, Ltd., a Canadian processor of apple concentrate, had negotiated a sale of 500 barrels of concentrate at $1.25 per gallon in fifty-gallon steel drums to the J. M. Smucker Company. The price for this exceedingly large order was 5 cents per gallon less than the seller's customary price of $1.30 on smaller purchases, which this buyer had refused to pay. Petitioner accepted a 3% commission on the controverted sale instead of his originally contemplated 5% commission because this "very large order" permitted substantial economies so that in the end he "would make more" (J.A. 77).

From the outset, petitioner maintained, and this Court later ruled, that a seller's broker was not covered by the prohibition of Section 2(c) (Br. pp. 12-20).

Furthermore, even assuming that the statute applied to him in the first place, petitioner contended that the price reduction to the buyer was accounted for by legitimate competitive and economic considerations other than his reduced rate of commission, and hence was not an allowance "in lieu of" brokerage within the contemplation of Section 2(c) (Br. pp. 20-27). To that end, petitioner pointed to record evidence that the seller's price reduction was responsive to competitive factors as well as cost economies flowing from this particular buyer's unusual quantity and method of purchase (J.A. 31, 75-76, 127-130, 132-135).

[fol. 31] However, having resolved the issue of statutory coverage adversely to petitioner, the Commission held "not applicable to a proceeding under subsection 2(c)" these factors tendered by petitioners to justify the controverted sales transaction (J.A. 204), and according-

ly issued an order to cease and desist, which flatly prohibited a "reduction in price" when "accompanied by a reduction in the regular rate of commission"—regardless of any cost or competitive considerations (J.A. 198).

After consideration of briefs and oral argument, on December 11, 1958 this Court set aside the Commission's order, holding that "Neither the language of § 2(c) nor its legislative history indicates that a seller's broker is covered by § 2(c). Accordingly we hold that petitioner, as seller's broker, did not violate § 2(c)." 261 F.2d 725, 728.

Since the Court reversed the Commission on the threshold issue of whether Section 2(c) covered a seller's broker, it had no occasion to review the Commission's rejection of petitioner's evidence and proposed findings that the reduced price to Smucker did not constitute an allowance "in lieu of" brokerage, but represented other cognizable economies and competitive circumstances relating to this particular buyer (J.A. 161, 163). Also, in view of its invalidation of the FTC's order on the merits, the Court did not reach or adjudicate the scope of the Commission's order to cease and desist.

Due to the Supreme Court's subsequent reversal of this Court's statutory interpretation that a seller's broker is not covered by Section 2(c), it is now appropriate to consider those issues, not adjudicated in this Court's original opinion, which independently invalidate the Commission's order.

[fol. 32] FACTORS IMPROPERLY REJECTED BY THE COMMISSION

As explained above, the Commission viewed "not applicable" in a Section 2(c) proceeding evidence that the seller's price to the buyer was responsive to economies and competitive considerations unrelated to petitioner's reduced brokerage commission. As previously urged by petitioner, "By foreclosing consideration of these factors, the Commission construed Section 2(c) to erect an irrebuttable presumption that a price reduction given by the seller to the buyer at the same time as a broker accepts a smaller commission automatically *is and must be* an

'allowance in lieu of brokerage'" (Br. pp. 25-26). The Commission incorporated its ruling in the cease and desist order, which unconditionally condemned a "reduction in price" when "accompanied by a reduction in [the broker's] regular rate of commission" (J.A. 198) (See Reply Br. pp. 4-9).

Two legal developments subsequent to this Court's original consideration of the case in 1958 confirm that the Commission erroneously rejected these factors as "not applicable":

The Supreme Court's opinion in the instant case stressed the vital nature of evidence "that the buyer rendered any services to the sel . or to the [broker]" or "that anything in [the buyer's] method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge." 363 U.S. 166, 173. Indeed, according to the Supreme Court, such evidence would create "quite a different case." *Ibid.*

Not only did the Supreme Court underscore the importance of such factors in determining whether Section 2(c) was violated, but the Commission itself has apparently retreated from its extreme position of total rejection applied in the case at bar. Thus, most recently in *Thomasville Chair Co.*, Dkt. 7273 (May 11, 1959), the Commission for the first time adopted the view that "all facts which would tend to rebut this inference [of an allowance in lieu of brokerage], including evidence to show that the lower prices charged certain buyers actually did not result from a passing on of a part of salesmen's commissions but was in fact due to some other cost difference, would be relevant to the point in issue and should be received"—the very considerations which the Commission deemed "not applicable" here (J.A. 204).*

[fol. 33]

In short, factors discarded by the Commission demonstrate that the lower price to Smucker was not the causal equivalent of the petitioner's commission, but was causal-

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* The Commission's about-face in *Thomasville*, however belated, is viewed by one commentator as potentially "the most constructive decision by the Commission in the history of its enforcement of Section 2(c)." Austin, *Price Discrimination and the Small Businessman*, 16 A.B.A. Antitrust Rep. 94, 105 (1960).

ly attributable to other economies and competitive considerations. And since, tested by these criteria, no allowance in lieu of brokerage was made by petitioner to the buyer, there is no proper foundation for the Commission's order to cease and desist.**

The Commission's Order Is Invalid in Any Event

Another question not reached by this Court's original opinion concerns the unduly broad scope of the Commis- [fol. 34] sion's cease and desist order even *assuming* the Commission's ruling is correct on the merits. Here again, supervening legal developments confirm the invalidity of the sweeping order entered in this case.

While deciding that Section 2(c) did apply to a seller's broker, the Supreme Court repeatedly emphasized that a price discrimination is a vital element in the application of Section 2(c), and stressed the importance of a buyer's "services" or "method of dealing" in the determination of whether an illicit allowance "in lieu of" brokerage existed. Thus, the elimination or reduction of a brokerage commission by a seller will give rise to an illegal allowance "in lieu of" brokerage in violation of Section 2(c) only if thereby a price discrimination to a favored customer is effected—provided "There is no evidence that the buyer rendered any services to the seller or to the [broker] nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge." 363 U.S. 166, 173, 176, 177 n. 19.

Yet, the Commission's blanket cease and desist order *

** The Court may wish to reaffirm its previous judgment of December 11, 1958, setting aside the Commission's order, or remand the proceeding to the Commission for further appropriate consideration. Cf. *A. E. Staley Mfg. Co.* v. *Federal Trade Commission*, 135 F.2d 453, 456 (7th Cir. 1943).

* The operative provisions of the order prohibit petitioner from "(1) Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any

ignores these elements entirely. If any future reduction [fol. 35] in petitioner's brokerage commission by the seller were coupled with a uniform price reduction by him to *all* customers, petitioner might nonetheless be in violation of paragraph 2 of the order—a result which the Supreme Court characterized as "absurd." *Id.* at 176. Furthermore, both paragraphs of the order purport to impose liability regardless of buyer services or methods of the type which the Supreme Court specified as creating "quite a different case."

The Commission's order is also defective on a more basic ground—its sweeping ban on transactions by petitioner on behalf of *all* sellers with *all* customers even though the Commission's complaint and findings are limited to an asserted illegal payment respecting *one* seller and *one* customer in a unique situation.

Only months ago, the Supreme Court in *Communications Workers of America* v. *National Labor Relations Board*, 362 U.S. 479 (1960) (involving the National Labor Relations Act whose pertinent enforcement provisions are patterned on the Clayton Act provision governing the instant Federal Trade Commission order)* squarely ruled that a petitioner could not be indiscriminately ordered to cease and desist from violating the Labor Act as to a named employer "or any other employer," when

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food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage services; or

"(2) In any other manner, paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products to such buyer for its own account" (J.A. 198).

* See *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 268-69 (1940); *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 373 (1939).

the petitioner was not found to have violated the Act with respect to any but the named employer and there was no "generalized scheme" of illicit activity which supported an omnibus prohibition. *Id.* at 481. According to the Court, the Labor Board had no authority to issue such an order, which the Court modified by deleting the words "or any other employer."

[fol. 36] This landmark limitation by the Supreme Court upon the universal sweep of administrative orders coincides with comparable rulings by this Court and others subsequent to this Court's original review of the instant case. Thus, in *National Labor Relations Board* v. *United Brotherhood of Carpenters*, 276 F.2d 694 (7th Cir. 1960), this Court invalidated a similar omnibus prohibition of an order barring conduct versus "any other" person beyond the one involved in the administrative complaint and record. This Court's opinion approvingly quoted this basic principle of regulatory due process:

> "We are aware of the considerations supporting a broad grant of discretion to the Board in determining the proper remedy for a violation of the Act. We consider more important, and basic to a fair administration of the Act, the hard-won principle of Anglo-American law that a judgment or order must find adequate support in the record. An order of a court or federal agency that goes beyond the record to penalize an offender as a bad actor smacks too much of attainder to be acceptable to this Court." *Id.* at 700.*

This Court's opinion recognized not only the unfathomable legal duties imposed on a respondent by such blanket prohibitions, but also the burdens cast on reviewing courts in any subsequent enforcement proceedings based on other transactions in other circumstances. *Ibid.*

Lest labor unions enjoy a preferred legal position under an analogous statutory authorization for administrative

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* See similarly, *National Labor Relations Board* v. *Brandman Iron Co.*, Pike and Fischer Ad. Law (2d series) 645 (6th Cir. 1960), where the Court of Appeals *sua sponte* modified a comparable administrative order even though it had been agreed to by the respondent.

orders to cease and desist, these recent judicial declarations appear controlling here.

The Commission's instant order enjoins petitioner in transactions on behalf of Canada Foods, Ltd. or "*any* [fol. 37] *other* seller" from making any allowances in lieu of brokerage to the J. M. Smucker Company, "or to *any other buyer*," when this case from the beginning was confined to a single alleged payment by petitioner in a sale to Smucker on behalf of Canada Foods. Hence this case does not reflect "extensive" and "substantial" misconduct*—let alone any "generalized scheme" warranting a blanket prohibition for the future.

Thus, even if the Court should permit the Commission's ruling to stand on the merits, the FTC order is invalid insofar as it purports to reach transactions by respondent without limitation on behalf of *any* seller with *any* buyer beyond the specific parties involved in this case. Nor would such a holding impair the effectiveness of the Commission's legitimate enforcement in other cases, which ordinarily concern a "generalized scheme" or an extended course of conduct, rather than the single transaction at issue here.**

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* Compare *Federal Trade Commission* v. *Mandel Bros.*, 359 U.S. 385, 393 (1959). Also, nothing in the Supreme Court's earlier decisions supports the universal sweep of the FTC's instant order, which goes far beyond any "reasonable relation to the unlawful practices found to exist"—particularly in view of the isolated nature of respondent's challenged conduct which this Court and four Supreme Court Justices deemed lawful in a close case. Compare *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429 (1957); *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952) (liability uncontested in both cases).

Indeed, the Federal Trade Commission which recently received new legislative authorization to impose heavy fines for violation of final cease and desist orders was admonished by Congress "to issue order which are as definitive as possible." S. Rep. No. 83, 86th Cong., 1st Sess. 3 (1959). And the Commission's Chairman has acknowle lged a responsibility for "ever more careful drafting of Commissi n orders" in light of these new and drastic penalties. Kintner, *The Federal Trade Commission Looks at the Canning Industry*, p. 22 (Jan. 19, 1960).

** See, e.g., the *Mandel Bros.*, *National Lead*, and *Ruberoid* cases, *supra*.

[fol. 38] CONCLUSION

For the aforementioned reasons, petitioner respectfully requests this Court summarily to set aside or modify the Commission's order, or to remand the proceeding for further appropriate action by the Commission itself.

If the Court concludes that its consideration of the above issues would be aided by further legal presentations addressed particularly to the pertinent supervening legal developments beyond the original presentations before this Court, the Court may wish to set a briefiing schedule and date for oral argument prior to adjudicating those issues left open by its original opinion and the Supreme Court's remandment.

Respectfully submitted,

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[fol. 39] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 40] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

Respondent's Answer in Opposition to Petitioner's Motion to Set Aside or Modify the Commission's Order—Filed October 26, 1960

The Federal Trade Commission opposes petitioner's motion for the following reasons:

1. Petitioner is seeking to have this Court reopen and consider an issue that already has been decided adversely to petitioner by the Supreme Court, and
2. Petitioner, contrary to basic and controlling principles, has moved that this Court now consider as an issue a contention petitioner did not raise before the Federal Trade Commission at the time the case was before the Commission, and one which petitioner did not argue before this Court at the time of its consideration of the petition for review.

Proceedings and Facts Preliminary to Petitioner's Motion

For the purpose of considering petitioner's motion, we reproduce here the statement of facts appearing at the outset of the Supreme Court's decision, 363 U.S. 166, 167-168:

[fol. 41] [Petitioner] is a broker or sales representative for a number of principals who sell food products. One of the principals is Canada Foods Ltd., a processor of apple concentrate and other products. [Petitioner] agreed to act for the Canada Foods for a 5% commission. Other brokers working for the same principal were promised a 4% commission. [Petitioner's] commission was higher because it stocked merchandise in advance of sales. Canada

Foods established a price for its 1954 pack of apple concentrate at $1.30 per gallon in 50-gallon drums and authorized its brokers to negotiate sales at that price.

The J. M. Smucker Co., a buyer, negotiated with another broker, Phipps, also working for Canada Foods, for apple concentrate. Smucker wanted a lower price than $1.30 but Canada Foods would not agree. Smucker finally offered $1.25 for a 500-gallon purchase. That was turned down by Canada Foods, acting through Phipps. Canada Foods took the position that the only way the price could be lowered would be through reduction in brokerage. About the same time [petitioner] was negotiating with Smucker. Canada Foods told [petitioner] what it had told Phipps, that the price to the buyer could be reduced only if the brokerage were cut; and it added that it would make the sale at $1.25—the buyer's bid—if [petitioner] would agree to reduce its brokerage from 5% to 3%. [Petitioner] agreed and the sale was consummated at that price and for that brokerage. The reduced price of $1.25 was thereafter granted Smucker on subsequent sales. But on sales to all other customers, whether through [petitioner] or other brokers, the price continued to be $1.30 and in each instance [petitioner] received the full 5% commission. Only on sales through [petitioner] to Smucker were the selling price and the brokerage reduced.

The Commission held, after issuance of complaint and appropriate administrative procedure, that Broch had violated Section 2(c) of the amended Clayton Act, which in part makes it unlawful for "any person" to make an allowance in lieu of "brokerage" to the "other party to such transaction," and the Commission thereupon issued its order to cease and desist.

Upon review, this Court held that a seller's broker is not covered by Section 2(c). This Court also held that, while the seller was able to reduce its price because of Broch's agreement to reduce its brokerage, Broch could [fol. 42] not be said to have paid anything to the buyer.

The decision concluded, "For the foregoing reasons, the order of the Federal Trade Commission entered December 10, 1957 is set aside. Order Set Aside."

The Supreme Court, on June 6, 1960, held that a seller's broker is covered by the provisions of Section 2(c) and that Broch had violated that section. The Court reversed this Court's judgment and remanded the cause to this Court for proceedings in conformity with the Supreme Court's opinion.

Thereafter, Broch petitioned the Supreme Court for rehearing, which petition was denied on October 10, 1960.

Petitioner now moves this Court to set aside or modify the Federal Trade Commission's order to cease and desist and advances two contentions in support of its motion. As nearly as we can tell from petitioner's motion, these contentions are:

1. "• • • The price reduction to the buyer was accounted for by legitimate competitive and economic considerations other than [petitioner's] reduced rate of commission, and hence was not an allowance 'in lieu of' brokerage within the contemplation of Section 2(c)." (Motion, p. 2.)

2. The order is unduly broad.

The propriety of making these contentions at this time is discussed seriatim under headings numbered I and II.

[fol. 43] I. *The Supreme Court already has determined that Broch made an allowance in lieu of brokerage to the buyer in violation of Section 2(c) of the amended Clayton Act and petitioner cannot now be heard to contend that the facts established a price discrimination granted because of competitive and economic considerations rather than the payment of an allowance in lieu of brokerage.*

From a reading of petitioner's motion one might gain the impression that the Supreme Court in this matter held only, and this by a 5-4 margin, that a seller's broker is covered by Section 2(c) of the amended Clayton Act, so that all other issues involved in the case were left unresolved. Nothing could be further from the truth.

All nine Justices of the Supreme Court held that Section 2(c) of the amended Clayton Act applies to a seller's broker (Majority opinion, 363 U.S. at pp. 170, 175: minority opinion, 363 U.S. at p. 179). The members of the Supreme Court differed on the question of whether the seller's broker, under the facts of this case, had made an allowance in lieu of brokerage to the "other party to such transaction," the buyer, one of the acts prohibited by Section 2(c). The majority of the Court, after presentation by petitioner of substantially the same argument it now wants this Court to consider,[1] held that Sec- [fol. 44] tion 2(c) applied to the factual situation under review.[2] Four of the Justices were of the opinion that it did not.

This construction of the Court's opinion is obvious from a reading thereof[3] and is the construction placed upon the opinion by petitioner when it petitioned the Supreme Court for a rehearing on August 15, 1960, and stated (at p. 2), "*In concluding that the case at bar disclosed a violation of Section 2(c),* the majority opinion expressly reserved a decision of the facts which it erroneously assumed to be absent here." (Emphasis supplied.)

Further, petitioner (Motion, p. 4) now grounds its contention upon certain quotations from the Supreme Court's opinion, but neglects to include in the quotations those portions whereby the Supreme Court has made it clear that those quoted portions do not apply to the present case. The complete paragraph from which petitioner picked particular parts reads as follows:

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[1] Various portions of petitioner's brief to the Supreme Court illustrative of the fact that petitioner presented its "competitive and economic considerations" argument to that Court are reproduced in the appendix hereto. (App. 1a-2a.)

[2] And all of the facts of this case certified for consideration by this Court of Appeals were before the Supreme Court.

[3] We do not wish to belabor this obvious fact in this narrative of our opposition. Therefore, for the Court's convenience, we have reprinted in an appendix hereto some of the portions of the Supreme Court's opinion that demonstrate that the Court decided that the broker in this case, upon the facts of this case, violated Section 2(c). (App. 3a-4a.)

> We are asked to distinguish these precedents on the ground that there is no claim by the present buyer that the price reduction, concededly based in part on a saving to the seller of part of his regular brokerage cost on the particular sale, was justified by the elimination of services normally performed by the seller or his broker. *There is no evidence that the buyer rendered any services to the seller or to*
> [fol. 45] *the respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge.* We would have quite a different case *if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances. One thing is clear—the absence of such evidence and the absence of a claim that the rendition of services or savings in distribution costs justified the allowance does not support the view that § 2(c) has not been violated.* (363 U.S., at pp. 173-174.) (Emphasis supplied.)

And on the last page of its opinion (363 U.S. n. 19, p. 177) the Court stated:

> • • • as we have emphasized, the "savings" in brokerage was passed on to a single buyer who was not shown in any way to have deserved favored treatment.

Petitioner, in its August 15, 1960, petition to the Supreme Court for rehearing, attempted to get that Court to reconsider its conclusion that the considerations noted in the paragraph quoted above had no application to the present case.[4] That petition was denied. The Supreme Court having refused to change its decision, petitioner is now in the position of asking this Court to change the decision of the Supreme Court.

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[4] The pertinent portion of petitioner's petition to the Supreme Court for rehearing is reproduced in the appendix at the end of this answer. (App. 5a.)

II. *The scope of the Commission's order is not properly a matter for this Court's consideration at this time.*

That portion of petitioner's motion which is directed to the scope of the Commission's order to cease and desist (Motion, pp. 5-9) should be denied on the basis of two basic and controlling principles: (1) issues not raised before an administrative agency may not be raised at the time of court review of the administrative decision; and (2) contentions not argued before the Court are waived.

[fol. 46] 1. Petitioner did not challenge the scope of the order in its appeal to the Commission from the initial decision of the hearing examiner and, therefore, should not be heard to raise an issue as to the scope of the order before this Court.

The Commission's rules of practice provide that an appeal from an initial decision to the Commission shall be in the form of a brief and shall contain among other things a list of the questions involved and to be argued and an argument presenting clearly the points of fact and law relied upon in support of the position taken on each question. 16 CFR 3.22(b). Pertinent portions of the rule are reproduced in the appendix hereto. (App. 6a.)

The order to cease and desist was issued by the hearing examiner as a part of his initial decision (J.A. 194-195) and was adopted by the Commission as its own (J.A. 197-205) after submission of briefs and oral arguments by both sides, in the course of which petitioner raised no issue as to the scope of the order.[5]

The controlling rule has been clearly stated by the Supreme Court in *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414 (1958) as follows:

> If the question has not been raised before the Commission, • • • a reviewing court should not in any event entertain it.

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[5] Petitioner's appeal brief to the Commission appears at pages 156 through 187 of the transcript of record certified to this Court.

The reasons underlying the rule were explained by the Supreme Court in the earlier case of *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952) as follows:

> [fol. 47] We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. * * * Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.[6]

2. Petitioner made no argument to this Court, at the time of consideration of the petition for review, on the question of the scope of the order and, therefore, its contentions on this score were waived.

Petitioner, in the footnote on page 1 of its Motion, states, "These issues are comprehended within the original petition for review (J.A. 206)." Petitioner, however, did not go on to indicate where in its argument to this Court during the course of this Court's consideration of its petition for review it pursued this contention. It did not because it could not.

In *Taylor* v. *Fee*, 233 F.2d 251, 259 (7th Cir. 1956), *aff'd*, 353 U.S. 553 (1957) this Court stated:

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[6] This Court has ruled to the same effect in *United States ex rel. Beck* v. *Neelly*, 202 F.2d 221, 224 (7th Cir. 1953), *cert. denied*, 345 U.S. 997 (1953). For examples of other cases to the same effect, see *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143, 155 (1946); *Barclay Home Products Inc.* v. *Federal Trade Commission*, 241 F.2d 451, 452 (D.C. Cir. 1957), *cert. denied*, 354 U.S. 942 (1957); *Democrat Printing Co.* v. *Federal Communications Commission*, 202 F.2d 298, 303-304 (D.C. Cir. 1952); *DeGorter* v. *Federal Trade Commission*, 244 F.2d 270, 272 (9th Cir. 1957).

In its brief herein the state makes no further reference to this contention ignoring it in its "summary of argument," "propositions of law relied upon and [fol. 48] citation of authorities" and in the body of its argument (See rule 16 of this court referring to the contents of briefs). No reference thereto was made in oral argument before this court. Under these circstances we treat this contention as waived.[7]

On review, the Supreme Court, *sub nom. California* v. *Taylor*, 353 U.S. 553, 556 n. 2 (1957), refused to recognize the contention involved by reason of this Court having considered the contention as waived.

Conclusion

Respondent believes that it is so clear that petitioner's contentions should not be considered by this Court that it has not included in its answer any discussion of the merits of those contentions. It is respectfully submitted that there are no further issues properly before this Court and that this Court should enter its decree affirming the Commission's order to cease and desist.

[fol. 49] If, however, this Court should decide to consider the merits of petitioner's contentions, it is respectfully requested that respondent be given an opportunity

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[7] To the same effect, see *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 369 (1927); *Donnalley* v. *United States*, 276 U.S. 505, 511 (1923); *Mid-Southern Foundation* v. *Commission of Internal Revenue*, 262 F.2d 134, 139 (6th Cir. 1958), *cert. denied*, 359 U.S. 991 (1959); *Roberts* v. *Sawyer*, 252 F.2d 286, 287 (10th Cir. 1958); *Rystad* v. *Boyd*, 246 F.2d 246, 248 (9th Cir. 1957), *cert. denied*, 355 U.S. 912 (1958); *Chain Institute, Inc.* v. *Federal Trade Commission*, 246 F.2d 231, 235 (8th Cir. 1957), *cert. denied*, 355 U.S. 895 (1957); *Sunbeam Corporation* v. *Masters of Miami*, 225 F.2d 191, 192-193 (5th Cir. 1955); *Mahanor* v. *United States*, 192 F.2d 873, 877 (1st Cir. 1951); *Hubsiaman* v. *Louis Keer Shoe Co.*, 129 F.2d 137, 142 (7th Cir. 1942); *Cooper* v. *O'Connor*, 107 F.2d 207, 209 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 617 (1939).

to demonstrate its reasons for believing that said contentions are without merit.

Respectfully submitted,

/s/ P. B. Morehouse
Acting General Counsel,
Federal Trade Commission.

/s/ Alan B. Hobbes
Assistant General Counsel,
Federal Trade Commission.

/s/ Alvin L. Berman
Attorney,
Federal Trade Commission.
Attorneys for Respondents

Dated: October 25, 1960.

[fol. 50] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 51] APPENDIX TO RESPONDENT'S ANSWER

EXCERPTS FROM PETITIONER'S BRIEF TO THE SUPREME COURT TO ILLUSTRATE THAT PETITIONER PRESENTED ITS "COMPETITIVE AND ECONOMIC CONSIDERATIONS" ARGUMENT TO THAT COURT *

[2]

* * * *

QUESTIONS PRESENTED

* * * *

[3]

* * * *

The focal question before this Court is whether a broker taking a smaller rate of commission when the seller principal openly reduces his price is guilty of granting to the buyer an allowance "in lieu" of an illicit brokerage payment in violation of Section 2(c)—*irrespective of the cost or competitive considerations which would make the seller's price lawful* under the provision governing variations in price. (Emphasis supplied.)

[15]

* * * *

SUMMARY OF ARGUMENT

I. Section 2(c), the so-called Brokerage Clause of the Robinson-Patman Act, does not prohibit an independent broker representing the seller from accepting a lower commission rate on a particular sale *where the seller at the same time openly reduces his price to the buyer for a large lot in a competitive situation.* (Emphasis supplied.)

* * * *

[16]

* * * *

The Commission's novel theory of condemning as illegal

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* The illustrations are reproduced as examples and are not intended to be exhaustive.

per se an open price reduction unrelated to an illicit Brokerage payment not only contravenes the text, history, and judicial application of Section 2(c), but does not even square with the Commission's previous position before this Court in the *Simplicity* case and the views of its own authorities which confirm that the Brokerage Clause is not a proper vehicle for outlawing those *open price reductions which Congress wished to preserve under the pricing provisions of the Act.* (Emphasis supplied.)

[fol. 52]

• • • •

[19]

• • • •

ARGUMENT

• • • •

[20]

• • • •

As detailed below, *the FTC's novel theory perverts the statutory plan by treating a competitive open price transaction as a per se illegal allowance "in lieu" of brokerage,* departs from every judicial ruling in point, and contradicts the Congressional understanding and the Commission's representations in the *Simplicity* case. (Emphasis supplied.)

• • • •

[29]

• • • •

Moreover, such illegality would attach irrespective of any competitive effects; regardless of the seller's necessities of reducing his price in good faith to meet a competitor's equally low price as permitted by Section 2(b); notwithstanding the seller's savings in an economical transaction which can "cost-justify" a lower price under Section 2(a); and despite the understanding of the transaction by all parties in terms of price rather than brokerage (see pp. 9-10, supra). (Emphasis supplied.)

• • • •

[32]

• • • •

By now asserting that brokerage fees *must not* be reduced regardless of *the seller's competitive price variation*, the Commission not only defeats the Congressional guarantees, but adopts the very excrescences of the Brokerage Clause which were decried by Senator Logan two decades ago as among the "rather fantastic ideas advanced" to discredit the legislation. (Emphasis supplied.)

• • • •

[34]

• • • •

Apart from the fact that *a seller's open competitive price reduction coupled with a smaller broker's fee is not an allowance "in lieu" of illicit brokerage*, which [35] alone requires affirmance of the judgment below, the Commission's theories *vis a vis* the independent seller's broker participating in such a transaction are *a fortiorari* invalid on additional grounds. (Emphasis supplied.)

[fol. 53]

SOME OF THE PORTIONS OF THE SUPREME COURT'S OPINION, 363 U.S. 166, THAT DEMONSTRATE THAT THE COURT DECIDED, UPON THE FACTS OF THE CASE, THAT BROCH MADE AN ALLOWANCE IN LIEU OF BROKERAGE IN VIOLATION OF SECTION 2(c) OF THE AMENDED CLAYTON ACT[9]

Section 2(c) of the Robinson-Patman Act makes it unlawful for "any person" to make an allowance in lieu of "brokerage" to the "other party to such transaction." *The question is whether that prohibition is applicable to the following transactions by respondent.* (at p. 167)

[This is followed by a detailed recitation of the facts deemed pertinent by the Supreme Court.] (at pp. 167-168)

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[9] These are examples only. The entire opinion follows a detailed recitation of the facts and clearly constitutes a decision that Broch violated Section 2(c).

The particular evil at which § 2(c) is aimed can be as easily perpetrated by a seller's broker as by the seller himself. The seller and his broker can of course agree on any brokerage fee that they wish. Yet when they agree upon one, only to reduce it when necessary to meet the demands of a favored buyer, they use the reduction in brokerage to undermine the policy of § 2(c). The seller's broker is clearly "any person" as the words are used in § 2(c)—as clearly such as a buyer's broker. (at p. 170)

We are asked to distinguish these precedents on the ground that there is no claim by the present buyer that the price reduction, concededly based in part on a saving to the seller of part of his regular brokerage cost on the particular sale, was justified by the elimination of services normally performed by the seller or his broker. *There is no evidence that the buyer rendered any services to the seller or to the respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. We would have quite a different case if there were such evidence* and we need not explore the applicability of § 2(c) to such circumstances. One thing is clear—*the absence of such evidence* and the absence of a claim that the rendition of services or savings in distribution costs justified the allowance does not support the view that § 2(c) has not been violated.

• • • •

• • • *If respondent merely paid over part of his commission to the buyer, he clearly would have violated the* [fol. 54] *Act. We see no distinction of substance between the two transactions.* In each case the seller and his broker make a concession to the buyer as a consequence of his economic power. In both cases the result is that the buyer has received a discriminatory price. In both cases the seller's broker reduces his usual brokerage fee to get a particular contract. There is no difference in economic effect between the seller's broker splitting his brokerage commission with the buyer and in his yielding part of the brokerage to the seller to be passed on to the buyer in the form of a lower price.

• • • •

• • • *The respondent was a necessary party to the price reduction granted the buyer. His yielding of part of his brokerage to be passed on to the buyer was a sine qua non of the price reduction.*

• • • •

• • • A price reduction based upon alleged savings in brokerage expenses is an "allowance in lieu of brokerage" when given only to favored customers. *Had respondent, for example, agreed to accept a 3% commission on all sales to all buyers there plainly would be no room for finding that the price reductions were violations of § 2(c).* Neither the legislative history nor the purposes of the Act would require such an absurd result, and neither the Commission nor the courts have ever suggested it. *Here, however, the reduction in brokerage was made to obtain this particular order and this order only and therefore was clearly discriminatory.*

The applicability of § 2(c) to seller's brokers *under circumstances not distinguishable in principle from the present case* is supported by a 20-year-old administrative interpretation. • • •

If we held that § 2(c) is not applicable here, we would disregard the history which we have delineated, overturn a settled administrative practice, and approve a construction that is hostile to the statutory scheme—one that would leave a large loophole in the Act. • • •

(at pp. 173-177)

We need not view this administrative practice as laying down an absolute rule that § 2(c) is violated by the passing on of savings in broker's commissions to direct buyers *for here, as we have emphasized, the "savings" in brokerage was passed on to a single buyer who was not shown in any way to have deserved favored treatment.* (note 19, p. 177)

—(Emphasis supplied throughout.)

[fol. 55]

EXCERPT FROM PETITIONER'S PETITION TO THE SUPREME COURT FOR REHEARING [10]

1. The Majority Opinion Contains a Key Misconception of Fact

In concluding that the case at bar disclosed a violation of Section 2(c), the majority opinion expressly reserved a decision under facts which it erroneously assumed to be absent here.

Thus, the opinion declared that "There is no evidence that the buyer rendered any services to the seller or to the [broker] nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge." 363 U.S. at 173, 177, n. 19. Indeed, the opinion stressed that "We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances." *Id.* at 173.

Yet precisely such evidence is revealed in the record and proposed findings, but was treated by the Commission as legally immaterial in a Brokerage Clause proceeding. (R. 8, 81, 131-134, 170, 172, 210)

From the outset of this case, the respondent maintained that the transaction reflecting the seller's lower price and the broker's reduced commission entailed "savings to the seller principal in the cost of handling and delivery of the goods sold," and required less sales effort and selling expense for the respondent broker. (R. 8, 131-134, 170, 172) The record contains specific evidence of the seller's savings in freight, customs and processing of the product in question. (R. 133) For the broker, the record shows that this transaction concerned "a very large order, and it is much cheaper in our office because, in order to obtain smaller customers for the same sized order, we might have to make thirty or forty or fifty or sixty long distance calls which are very costly in time

[10] This demonstrates that the petition for rehearing, which was denied, was based upon the same grounds that petitioner now presents to this Court.

and expense, actual cash expense, and on this three per cent, we would make more." (R. 81)

In short, the very "circumstances" which the majority opinion reserved as presenting "quite a different case" are actually disclosed by the instant record and were overlooked by an opinion preoccupied with novel legal issues. (pp. 2-3.)

[fol. 56]

PERTINENT PORTIONS OF FEDERAL TRADE COMMISSION RULES COVERING APPEALS TO THE COMMISSION AND THE MANNER OF PRESENTING QUESTIONS ON APPEAL (RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS 16 CFR 3.22

§ 3.22 *Appeal from initial decision*—

(a) *Who may appeal: notice of intention.* Any party to a proceeding may appeal an initial decision to the Commission. • • •

(b) *Content of appeal brief.* (1) The appeal shall be in the form of a brief and shall contain, in the order indicated below, the following:

• • • •

(iii) A list of the questions involved and to be argued; and

(iv) An argument presenting clearly the points of fact and law relied upon in support of the position taken on each question, with specific page references to the trans ript and upon the legal or other material relied upon.

(2) Material not included in the appeal may not be presented to the Commission in oral argument or otherwise.

[fol. 57] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

MOTION FOR LEAVE TO FILE ATTACHED REPLY TO RESPONDENT'S ANSWER IN OPPOSITION TO PETITIONER'S MOTION TO SET ASIDE OR MODIFY THE COMMISSION'S ORDER—Filed October 28, 1960

Petitioner respectfully requests leave of Court to file the attached reply to the answer filed by the Federal Trade Commission opposing petitioner's motion requesting the Court to set aside or modify the Commission's cease and desist order for reasons not considered in the original opinion in this case. 261 F.2d 725.

As demonstrated in the attached reply of petitioner, the Commission has significantly failed to address itself to the merits, and instead has obscured both the record and the pertinent legal considerations that govern this case. Since the Commission's contentions confuse rather than meet the points presented by petitioner's motion, petitioner respectfully submits that sound judicial administration, as well as basic fairness to petitioner, warrant the Court's consideration of the attached reply.

Respectfully submitted,

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• • • •

[fol. 59]

• • • •

REPLY TO RESPONDENT'S ANSWER IN OPPOSITION TO PETITIONER'S MOTION TO SET ASIDE OR MODIFY THE COMMISSION'S ORDER—Filed October 28, 1960

Not only is the Commission's attempt to duck consideration of the issues remaining in this case belied by the Supreme Court's express remand for "further proceedings," but equally important, the Commission's characterization of those issues cannot be squared with the record.

"When [the Supreme Court] determines that a Court of Appeals has applied an incorrect principle of law, wise judicial administration normally counsels remand of the cause to the Court of Appeals with instructions to reconsider the record." *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951). This is precisely what the Supreme Court has done here. Cf. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). The Supreme Court did not, as the Commission in effect urges, reinstate the Commission decision so as to preclude this Court's right to consider petitioner's contentions on their merits.

Unless the Supreme Court's remand for "further proceedings" in conformity with its opinion is an empty formality devoid of legal significance, the express terms of the remand alone must foreclose the Commission's effort to block consideration at this time of the issues not reached by this Court's original decision in December 11, 1958.

[fol. 60]

Economic And Competitive Considerations Improperly Rejected By The Commission

From the outset of this case, as the Commission recognizes (Answer pp. 4-6), petitioner contended that even if Section 2(c) applied to him in the first place, the seller's price reduction to Smucker was accounted for by legitimate economic and competitive considerations which demonstrated that it was not an illegal allowance "in lieu of" brokerage. These considerations, however, the Com-

mission ruled "not applicable" to a Section 2(c) proceeding (Motion pp. 4-5).

In view of the Commission's rejection of these considerations as "not applicable" to a Brokerage Clause proceeding, the Supreme Court understandably assumed that

> "There is no evidence that the buyer rendered any services to the seller or to the [petitioner] nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances." 363 U.S. 166, 173.

It would be a strange doctrine indeed if the Commission were allowed first to foreclose an evidentiary showing on the ground that it was "not applicable," and then to profit later from a claim that petitioner has not made the requisite evidentiary showing. Only recently, the Supreme Court scored a Commission effort to invoke this very bootstrap doctrine so that it might capitalize on the absence of proof which it had previously rejected in a Robinson-Patman proceeding. Cf. *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 402 (1958).

Particularly in view of the Commission's subsequent retreat in the *Thomasville* case in May 1959 from its rejection of such considerations here in December 1958 (Motion p. 5), the Commission can hardly now urge that this Court has no right to consider petitioner's contentions in the face of the Supreme Court's remandment. Indeed, the Commission's reluctance to address itself to the merits corroborates the force of petitioner's position.

[fol. 61]

Invalidity Of Commission Order To Cease And Desist

The Commission's failure to defend its order on the merits is equally telling in light of petitioner's previous challenges to the order's validity, which are confirmed by judicial developments subsequent to the original briefing of this case in 1958.

Petitioner challenged the Commission's order in his petition for review (J.A. 209), and specifically argued in his original briefs that "either the Commission order or Commission counsel's appellate theory must be invalid" (Reply Br. p. 7). At all times, petitioner contested the legal theory codified in the Commission's order which *automatically* declares a price reduction coupled with a lower broker's commission to be an illegal brokerage allowance—*wholly irrespective* of the cost and competitive considerations which the Supreme Court's opinion stressed as crucial to the determination of a Brokerage Clause violation (Br. pp. 20-23; Reply Br. pp. 6-8).

Surely petitioner in its briefs before the Commission and this Court in 1958 could not have been expected to discuss the Supreme Court and appellate court decisions *decided in 1960* (Motion pp. 7-8) which highlight the invalidity of the Commission's sweeping order.*

The most elementary considerations of fairness dictate that the Commission must not handicap a small food broker forever with an unduly restrictive injunction, which is based on a single business transaction considered entirely lawful by this Court and four Justices of the Supreme Court. Failing to meet the merits of petitioner's motion, the Commission would preclude this Court's review by resort to groundless technicalities.

[fol. 62] CONCLUSION

If the Court should conclude that the issues tendered by petitioner were not sufficiently explored by the Commission at the administrative level, the proper course would be to remand to the Commission for further ap-

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* Equity and precedent alike hold that *supervening* legal developments are *always* open for consideration in the course of a pending judicial review. E.g., *American Chain & Cable Co.* v. *Federal Trade Commission*, 142 F.2d 909 (4th Cir. 1944); *American Drug Co.* v. *Federal Trade Commission*, 149 F.2d 608 (8th Cir. 1945); cf. *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364 (1939); *National Labor Relations Board* v. *Service Trade Chauffeurs Local*, 191 F.2d 65 (2d Cir. 1951).

propriate consideration, rather than to foreclose all opportunity for a ruling on the merits.

Respectfully submitted,

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11 South La Salle Street
Chicago 3, Illinois
Attorneys for Petitioners

[fol. 63] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 64] IN
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge

No. 12305

HENRY BROCH AND COMPANY, a co-partnership consisting of Henry Broch and Oscar Adler, PETITIONERS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

ORDER GRANTING LEAVE TO FILE A REPLY TO RESPONDENT'S ANSWER, ETC.—
November 3, 1960

The Court having considered the motion of Henry Broch and Company, petitioners, for leave to file a reply to respondent's answer, IT IS HEREBY ORDERED that said leave is hereby granted.

And the court having considered the motion of said petitioner to set aside or modify Commission order for reasons not considered in original opinion, respondent's answer thereto, and petitioners' reply to said answer, IT IS HEBERY ORDERED that petitioners' said motion be and the same is hereby denied.

On the court's own motion IT IS HEREBY ORDERED that the order of the Commission is hereby amended and modified in the following respects:

Strike from the order of the hearing examiner, appearing on pages 194 and 195 of the joint appendix herein, which was adopted as the decision of the Commission, in its final order shown on page 197 of said joint appendix, the following language:

"or any other seller principal,"
"or to any other buyer,"
"or any other seller principal,"
"or to any other buyer,"

IT IS FURTHER ORDERED that the order of the Commission, as so amended and modified, be affirmed.

[fol. 65] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 66] SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1960

FEDERAL TRADE COMMISSION, PETITIONER

v.

HENRY BROCH AND COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—January 31, 1961

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 1st, 1961.

/s/ Tom C. Clark
Associate Justice of the Supreme Court of the United States

Dated this 31 day of January, 1961.

[fol. 67] SUPREME COURT OF THE UNITED STATES

No. 864, October Term, 1960

FEDERAL TRADE COMMISSION, PETITIONER

vs.

HENRY BROCH AND COMPANY

ORDER ALLOWING CERTIORARI—May 15, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary calendar and set for argument immediately following No. 654.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 68] SUPREME COURT OF THE UNITED STATES

No. 864, October Term, 1960

FEDERAL TRADE COMMISSION, PETITIONER

vs.

HENRY BROCH AND COMPANY

ORDER GRANTING JOINT MOTION TO USE THE RECORD IN No. 61, OCTOBER TERM, 1959—June 19, 1961

ON CONSIDERATION of the joint motion for leave to use the record in No. 61, October Term, 1959,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 000000 8

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

HENRY BROCH AND COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit entered in this case on November 3, 1960.

OPINION BELOW

The court of appeals did not render an opinion. Its judgment is set forth in Appendix A, *infra*, pp. 12–13.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1960 (*infra*, p. 12) and the time for filing a petition for certiorari was extended, by order of Mr. Justice Clark, from January 31, 1961 to April 1, 1961 (Appendix B, *infra*, p. 14). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in narrowing *sua sponte* the scope of the Federal Trade Commission's cease and desist order, when respondent had not attacked the breadth of the order before the Commission or in the proceeding to review the legality of the order.[1]

2. Whether the Commission exceeded the discretion vested in it respecting determination of the relief appropriate and necessary to prevent further statutory violations when it prohibited respondent from engaging in conduct found to violate § 2(c) of the Clayton Act without confining the prohibition to transactions between the particular seller and the particular buyer involved in the violation which the Commission had found.

STATUTE INVOLVED

Section 11 of the Clayton Act, as amended by the Act of July 23, 1959, 73 Stat. 243, 15 U.S.C., Supp. I, 21, deals with the Commission's authority to enforce § 2 of the Act. Subsection (a) authorizes the Federal Trade Commission to enforce compliance with §§ 2, 3, 7 and 8 of the Act (except insofar as the section gives other Federal agencies jurisdiction to enforce as against carriers and banks). Subsection (b) provides that if the Commission has reason to believe that any person is violating or has violated any of the provisions of §§ 2, 3, 7 and 8, it shall issue a complaint stat-

[1] A related question is presented in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. 654, certiorari granted, March 6, 1961.

ing its charges, and give notice of a hearing thereon. Subsection (b) further provides:

> If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, * * * in the manner and within the time fixed by said order. * * *

Subsection (c) provides in part:

> Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the [appropriate] court of appeals of the United States * * * by filing in the court * * * a written petition praying that the order of the commission or board be set aside. * * * Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein * * *, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, * * *.

STATEMENT

In this case the Federal Trade Commission, after full administrative proceedings, entered a cease and desist order against respondent Broch and Company (Broch) based on the Commission's determination that Broch, while acting as a broker for Canada

Foods, Ltd., in sales made to The J. M. Smucker Company, had violated § 2(c) of the Clayton Act. On Broch's petition for review, the court below set aside the Commission's order upon the ground that § 2(c) does not apply to the seller's broker, and upon the further ground that Broch had not granted part of his commission, or an allowance in lieu thereof, to the buyer. In *Federal Trade Commission* v. *Broch & Co.*, 363 U.S. 166, this Court held these rulings of the court of appeals to be erroneous, reversed the judgment below, and remanded the cause.

Following the remand, Broch filed a motion to modify the Commission's order.[2] The motion (pp. 5–7) alleged that the order was "unduly broad" in that it covered all transactions in which Broch might act as broker, whereas the evidence and findings related solely to the violation of § 2(c) resulting from the part played by Broch in sales on behalf of one seller to one buyer. The Commission's answer stated (p. 7) that it had adopted as its own the order contained in the hearing examiner's initial decision; that under its rules of practice an appeal from an initial decision shall be in the form of a brief, which must list the questions to be argued; and that Broch's appeal brief had raised no issue as to the scope of the order proposed by the examiner.[3] The Commission

[2] The motion also asked the court to set aside the order, but this requested relief was not granted and is not pertinent here.

[3] The appeal brief is included in the transcript of the record in the court below, filed with this Court in the prior certiorari review (transcript of record in No. 61, October Term, 1959, pp. 156–187). The "questions presented" appear at pp. 167–168 of this transcript.

urged denial of the motion to modify, on the basis of the established principle that a court called upon to review an order of an administrative agency may not consider an issue which had not been raised before the agency (answer, pp. 6–8). The answer also stated (pp. 8–9) that Broch's petition for judicial review had not attacked the scope of the Commission's order, and referred to the settled rule that a contention not presented to a reviewing court is deemed waived. Opportunity to respond on the merits was requested in the event the court should decide that the merits were open for consideration (answer, p. 10).

Broch requested leave to file a reply, and in its reply characterized the answer as resorting to "groundless technicalities" to preclude review of an "unduly restrictive injunction" based on a transaction "considered entirely lawful by this Court and four Justices of the Supreme Court" (reply, p. 3).

The court thereupon entered an order which recited the foregoing pleadings and denied Broch's motion to modify. However, it modified the Commission's order "[o]n the court's own motion", and affirmed the order as so modified (Appendix A, *infra*, pp. 12–13). The modification made by the court restricted the prohibitions of the order to transactions in which Canada Foods, Ltd., was the seller and The J. M. Smucker Company was the buyer—precisely the relief sought by Broch's motion to modify.

REASONS FOR GRANTING THE WRIT

1. The court below clearly erred in modifying the Commission's order by materially restricting its scope,

when the party against whom the order ran had raised no question as to the order's scope either in the Commission proceedings or on review, until after the case was remanded to the court of appeals upon reversal of its decision by this Court.

Moog Industries, Inc. v. *Federal Trade Commission*, 355 U.S. 411, likewise involved exercise by a reviewing court of its statutory power to "modify" a Federal Trade Commission order. This Court said (p. 414) that if the question respecting which modification was sought had not been raised before the Commission, "a reviewing court should not in any event entertain it." The Court's unqualified statement was an application of the general rule set forth in *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36–37, as follows:

> We have recognized in more than a few decisions,[4] and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. * * * Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

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[4] Citing *Spiller* v. *Atchison, T. & S.F.R. Co.*, 253 U.S. 117, 130; *United States ex rel. Vajtauer* v. *Commissioner*, 273 U.S. 103, 113; *United States* v. *Northern Pacific R. Co.*, 288 U.S. 490, 494; *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143, 155.

The Commission's rules of practice, by requiring the party appealing from an initial decision to list "the questions involved and to be argued" (answer, p. 6a), underline the importance which the Commission attaches to presentation to it of alleged errors committed in the administrative proceeding. As this Court has pointed out (*Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 499–500), the Senate Judiciary Committee report on the Administrative Procedure Act endorsed the rule barring a reviewing court from considering an alleged error in an administrative agency proceeding which had not been brought to the attention of the agency. The report stated (S. Doc. 248, 79th Cong., 2d Sess., 289, n. 21):

> A party cannot wilfully fail to exhaust his administrative remedies and then, after the agency action has become operative, * * * resort to court without having given the agency an opportunity to determine the questions raised. If he so fails he is precluded from judicial review by the application of the time-honored doctrine of exhaustion of administrative remedies. * * *

The salutary rule against consideration by a reviewing court of an alleged error not presented to the administrative agency would be deprived of all substance if, as here, the court, while refusing to permit the party concerned to present the issue to the court, then undertook *sua sponte* to correct the asserted error. This Court has held such *sua sponte* action erroneous where review is pursuant to a statute barring consideration of an objection not urged before the agency, because intervention by

the court "on its own motion" would "seriously undermine" the policy established by Congress. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498–501. Whether the policy against permitting a party to attack an agency order upon a ground not presented to the agency is codified in the review statute or is a court-fashioned rule implied from applicable legal principles, the policy is equally undermined where the reviewing court intervenes on its own motion.

In the present case the error was compounded because the matter on which the court acted *sua sponte* had not even been presented to it in Broch's petition to review the Commission's order,[5] but was raised for the first time on remand from this Court, after the court below had rendered its final decision and its decision had been reversed by this Court. The judgment below thus stands as a precedent for untimely *sua sponte* judicial action, opening the door to a further, and we think wholly unwarranted, additional stage in administrative agency review proceedings, which unfortunately in many cases are already unduly protracted.[6]

2. Even if, contrary to what we have contended, the court was empowered on its own motion to restrict the scope of the order although Broch itself was precluded from asking such restriction, we sub-

[5] The statement in the review petition that the Commission's order is "vague" and "exceeds the statutory limits of Section 2(c)" (Record in No. 61, October Term, 1959, p. 214), does not raise the point that the order is too broad in scope, and no such point was made in Broch's court of appeals briefs.

[6] The Commission's order in this case was entered in December 1957 (Record in No. 61, October Term, 1959, p. 211).

mit that the court plainly erred in making the restriction which it wrote into the order. The Commission's order does not ban violation of § 2(c) in the broad, general terms of the statutory prohibition. The order bars violation in the precise manner in which Broch was found to have contravened the section—by reducing on sales to a particular buyer the brokerage commission charged on other sales for its principal, in order to enable sales to such buyer at prices below that charged in concurrent sales to others on behalf of its principal. The order properly proscribed such violation without limitation as to particular parties.

The Federal Trade Commission "has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed and "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist" (*Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608, 611, 613), and the Commission is "not required to limit its prohibition to the specific" violation found (*Federal Trade Commission* v. *Ruberoid Co.,* 343 U.S. 470, 474).

In view of these settled principles, the Commission plainly did not exceed its statutory authority in prohibiting a particularized kind of conduct found to violate § 2(c), without confining the prohibition to transactions between the one seller and the one buyer to which the evidence and findings relate. An order, particularized as to the kind of conduct barred but general as to those for whom and to whom the broker sells, is, we submit, the only kind of order which could be both effective and circumscribed to the kind of illegal conduct established by the evidence.

The court below apparently viewed *Communications Workers of America* v. *N.L.R.B.*, 362 U.S. 479, as holding, as a rule of law, that the prohibitions of an administrative agency order must be limited to conduct involving solely the party or parties as to which the evidence showed a statutory violation. We submit that the decision in *Communications Workers* turned on its particular facts, and established no inflexible general principle. In that case the Board had found that a local union whose members were employees of Ohio Consolidated Telephone Co., and the national union of which the local was a member, Communication Workers of America, had committed acts constituting unfair labor practices in the course of a strike by employees of Ohio Telephone. The Board's cease and desist order ran against both unions, and prohibited improper coercion of the employees of Ohio Telephone "or any other employer". This Court held that the quoted words should be eliminated. But the members of the local neither had nor could have "any other employer", and the national union was the collective bargaining representative for 730 local unions whose members were employees of approximately 100 employers, and it was only derivatively responsible (because of its approval and financial support of the strike by Ohio Telephone's employees) for the unlawful conduct found by the Board. On these facts (see petitioner's brief, No. 418, October Term, 1959, pp. 3–12), this Court concluded that inclusion in the order of the words "or any other employer" was unwarranted.

The Federal Trade Commission has advised the Solicitor General that it "has issued hundreds of orders under the Clayton Act", and that these "have consistently proscribed the unlawful practices found without being limited in application to the particular parties involved in the proved violations." The Commission fears that the judgment entered in the instant case will have a serious and detrimental impact on proceedings to review Commission orders directed against violation of the Clayton Act. The bearing of the *Communications Workers* decision on orders issued by other federal administrative agencies is also a matter of wide-spread importance.

CONCLUSION

This petition for a writ of certiorari should be granted.[1]

Respectfully submitted.

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Federal Trade Commission.

MARCH 1961.

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[1] See *F.T.C.* v. *Carter Products*, 346 U.S. 327; *F.T.C.* v. *American Crayon Co.*, 350 U.S. 907; *F.T.C.* v. *Sewell*, 353 U.S. 969; *F.T.C.* v. *Crafts*, 355 U.S. 9 (summary reversals).

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12305

HENRY BROCH AND COMPANY, A COPARTNERSHIP CONSISTING OF HENRY BROCH AND OSCAR ADLER, PETITIONERS, *v.* FEDERAL TRADE COMMISSION, RESPONDENT

November 3, 1960

Before Hon. JOHN S. HASTINGS, *Chief Judge;* Hon. F. RYAN DUFFY, *Circuit Judge;* Hon. ELMER J. SCHNACKENBERG, *Circuit Judge.*

The court having considered the motion of Henry Broch and Company, petitioners, for leave to file a reply to respondent's answer, IT IS HEREBY ORDERED that said leave is hereby granted.

And the court having considered the motion of said petitioner to set aside or modify Commission order for reasons not considered in original opinion, respondent's answer thereto, and petitioners' reply to said answer, IT IS HEREBY ORDERED that petitioners' said motion be and the same is hereby denied.

On the Court's own motion IT IS HEREBY ORDERED that the order of the Commission is hereby amended and modified in the following respects:

Strike from the order of the hearing examiner, appearing on pages 194 and 195 of the joint appendix herein, which was adopted as the decision of the Commission, in its final order shown on page 197 of said joint appendix, the following language:

"or any other seller principal,"
"or to any other buyer,"
"or any other seller principal,"
"or to any other buyer,"

IT IS FURTHER ORDERED that the order of the Commission, as so amended and modified, be affirmed.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1960

FEDERAL TRADE COMMISSION, PETITIONER *v.* HENRY BROCH AND COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 1st, 1961.

(S) TOM C. CLARK,
Associate Justice of the
Supreme Court of the United States.

Dated this 31 day of January, 1961.

U. S. GOVERNMENT PRINTING OFFICE: 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION, *Petitioner*

v.

HENRY BROCH & COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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DEC 3, 1957

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 864

FEDERAL TRADE COMMISSION, *Petitioner*

v.

HENRY BROCH & COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS

The prior opinions of the Federal Trade Commission, the Court of Appeals and this Court are reported, respectively, at 54 F.T.C. 673; 261 F. 2d 725; and 363 U.S. 166. The judgment of the Court of Appeals on remand modifying and affirming the Federal Trade Commission's order to cease and desist (Pet. 12) is unofficially reported at 1960 CCH Trade Cases par. 69,839.

QUESTION PRESENTED

Section 11 of the Clayton Act, as amended, 15 U.S.C. § 21 (1958), provides that any party subject to an order to cease and desist may petition for review by a Court

of Appeals, which thereupon shall have "jurisdiction to affirm, set aside, or modify the order of the Commission * * *."[1] In the instant case, the Court of Appeals modified an omnibus order which sweepingly enjoined respondent from all violations of Section 2(c) of the Robinson-Patman Act, far beyond the compass of the controversy at bar which concerned solely the respondent broker's participation in one unusual transaction between a specific seller and a specific buyer.[2]

Properly stated, the question presented is whether the Court of Appeals abused its statutory reviewing powers by modifying an administrative order exceeding the exigencies of the case, where from the outset respondent contested the legal premises underlying the order.

STATEMENT

From the beginning, this proceeding concerned a competitive contest between respondent and a rival food broker for a large sale of apple concentrate to one customer in 1954. To meet competition and the buyer's terms for his unusually large order, respondent accepted a reduced rate of brokerage commission from

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[1] The FTC's petition (Pet. 2-3) mistakenly invokes and excerpts Section 11 as amended in 1959, although Section 2 of the Act of July 23, 1959 explicitly renders the amendments inapplicable to review proceedings commenced before that date. Cf. *Sperry Rand Corp.* v. *Federal Trade Commission*, 1961 CCH Trade Cases par. 69,920 (D.C. Cir. Feb. 9, 1961).

[2] The FTC's petition incorrectly describes its order as "particularized" (Pet. 9), ignoring its second paragraph which universally proscribes brokerage payments or allowances "in any other manner, * * * directly or indirectly, to The J. M. Smucker Company, or to any other buyer." See the text of the order, note 3 *infra*.

his seller principal, at the same time as the seller lowered its price to this particular buyer.

The Federal Trade Commission's complaint challenged this single transaction as an illicit allowance of brokerage to the buyer on the part of respondent broker (R. 2), under a novel interpretation of Section 2(c) of the Robinson-Patman Act. 15 U.S.C. § 13(c). At the conclusion of the administrative hearing which concerned only the particular transaction for this seller with this buyer, the FTC issued an order broadly directing respondent to cease and desist from violating Section 2(c) "in any other manner," "directly or indirectly," in dealing on behalf of "any" seller with "any buyer."[3]

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[3] The order prohibits respondent "in connection with the sale of food or food products for Canada Foods Ltd., or any other seller principal," from

"(1) Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage services; *or*

"(2) In any other manner, paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to any other buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products to such buyer for its own account." (No. 61, O.T. 1959, R. 202, 204-205) (All record references hereafter denote the record in No. 61.)

Before the FTC, respondent had contended that Section 2(c) did not apply to him as an independent seller's broker, that no illicit brokerage payment arose from his acceptance of a smaller commission, and that this was a "wholly isolated transaction of *de minimis* dimensions." (Resp. Br. p. 23) Respondent also urged that the FTC's doctrine would not only hamstring his business, but would clash with national antitrust policy by stabilizing brokerage commissions in the distribution of food products—particularly since "Section 11 of the Clayton Act expressly declares that no Commission order 'shall in any wise relieve or absolve any person from any liability under the antitrust Acts.'" (Br. p. 26)

Upon review, the Court of Appeals set aside the FTC's order. The court held Section 2(c) inapplicable to independent sellers' brokers such as respondent, and ruled that no illicit brokerage payment resulted from a seller's price reduction when coupled with a reduction in brokerage commission. 261 F.2d 725. Also, noting that the FTC "did not proceed against the buyer or the seller," the court expressed doubt as to the public interest of proceeding against a "private grievance between rival brokers," and observed that

> "The effect of respondent's order is that the commissions of a seller's broker are rendered immune from reduction by the seller when it is negotiating for the sale of its food products, and hence such a reduction, when used as a basis for quotation of a lower price, is illegal." *Id.* at 728.

By a 5:4 decision on June 6, 1960, this Court reversed and remanded "for further proceedings consistent with the opinion." 363 U.S. 166. In the face of a dissenting opinion by four Justices expressing concern that "all

legitimate commission rates are frozen in destruction of competition, and in actual violation of the anti-trust laws," 363 U.S. at 180, the majority opinion stressed the narrow focus of its holding:

> "This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance 'in lieu' of brokerage has been granted. As the Commission itself has made clear, whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case." 363 U.S. at 175-176.

Indeed, the majority disclaimed "an absolute rule that § 2(c) is violated by the passing on of savings in broker's commissions to direct buyers, for here, as we have emphasized, the 'savings' in brokerage was passed on to a single buyer who was not shown in any way to have deserved favored treatment." *Id.* at 177 n. 19.

Following the remand, respondent filed a motion requesting the Court of Appeals, *inter alia*, to set aside or modify the FTC order for legal reasons not adjudicated in that court's original decision. The motion emphasized the incompatibility with this Court's opinion created by the broadside prohibition of the FTC's order on transactions by respondent on behalf of *all* sellers with *all* buyers in *any manner* (pp. 6-9). In addition, respondent cited this Court's supervening decision in *Communications Workers of America* v. *National Labor Relations Board*, 362 U.S. 479 (1960), which modified an order under the National Labor Relations Act, whose enforcement provisions were patterned after the Clayton Act, in the absence of any "generalized scheme" of illicit activity to support an

omnibus injunction reaching also conduct toward "any other employer." *Id.* at 481.

Disputing the court's *power to entertain* respondent's contentions, the FTC requested a judicial decree affirming the Commission's broad order to cease and desist, without explaining or justifying its factual basis in the record.[4] The Court of Appeals denied respondent's motion, but *sua sponte* modified the FTC order by deleting its references to "any other" sellers or buyers, and thereupon entered an order of affirmance.

ARGUMENT

As will be detailed, the modification of the FTC order by the Court of Appeals comports with traditional principles governing the statutory review of Federal Trade Commission orders, and does no more than conform the scope of the order with the compass of the administrative proceeding—in the absence of *any* showing to justify an omnibus injunction. That modification in no way usurps the FTC's *initial* responsibility for fashioning orders to cease and desist, but rather implements a reviewing court's obligation to supervise FTC orders which ultimately can become *judicial decrees* enforceable by contempt proceedings. Nor did the court err in revising an order which had been contested at every stage by respondent, whose post-remand motion amplified its earlier challenges in the proceeding on the merits. Judicial housekeeping of this nature by a Court of Appeals, based on the facts of a particular case, presents no overriding issue of public importance—particularly since the ruling be-

[4] Respondent's Answer in Opposition, Oct. 25, 1960, p. 9; Respondent's Memorandum in Opposition, Nov. 2, 1960, p. 5.

low has in *no reported instance* been followed by the modification of *any other* FTC order.

1. In Conforming the FTC Order With the Scope of the Administrative Proceeding, the Court of Appeals Did Not Exceed or Abuse Its Powers of Review

The Court of Appeals here properly declined to affirm an omnibus injunction, unsupported by *any* factual basis, in accord with this Court's unanimous holding in the *Communications Workers* case.

The narrow compass of the facts behind the adjudication at bar was traced by the majority opinion in this Court's decision on the merits. 363 U.S. 166, 173-176. Apart from stressing the "circumstances of each case" and disclaiming any "absolute rule" where "brokerage [was] passed on to a single buyer," *id.* at 176, 177 n. 19, the majority opinion repeatedly emphasized the element of discrimination in the application of Section 2(c). Throughout, the Court's opinion discussed the individual buyer's particular "services" or "method of dealing," as factors in the ascertainment of "a discriminatory price by means of a reduced brokerage charge." *Id.* at 173, 176, 177 n. 19.

The Commission's omnibus cease and desist order obliterated these elements entirely.[5] If any future reduction in respondent's brokerage commission by the seller were "passed on" as a *uniform* price "allowance" or "discount" to *all* customers, respondent could nonetheless violate paragraph 2—a result which this Court's opinion characterized as "absurd." *Id.* at 176.[6] Furthermore, both paragraphs of the order pur-

[5] See note 3, *supra*, for text of the order.

[6] Thus, the Commission recently found a Section 2(c) violation by a price reduction *in the absence of* discrimination between competitors. *Venus Foods, Inc.*, Dkt. 7212, p. 8 (Oct. 28, 1960).

port to impose liability *regardless* of buyer services or methods of the type which the Court excepted as creating "quite a different case." *Id.* at 173.

Finally, the impact of the order was magnified by its omnibus ban on transactions by respondent on behalf of *all* sellers with *all* customers which in *any manner*, directly or indirectly, transgress the vague proscriptions of Section 2(e).

In these circumstances, the Court of Appeals properly conformed the order with the contours of the case. As this Court's recent *Communications Workers* decision held, a respondent in a Labor Board proceeding could not be indiscriminately ordered to cease and desist from violating the Act as to a named employer "or any other employer," in the absence of a "generalized scheme" of illicit activity to support an omnibus prohibition. 362 U.S. 479, 481 (1960). There as here, the administrative order was judicially modified by deleting the catch-all words ensnaring transactions with "any other" person.

In this case, the Court of Appeals did not exceed its limited supervisory role over administrative orders to cease and desist. Only weeks after modifying the instant order, the court declined to revise another agency order in a price discrimination case, acknowledging that "the nature of sanctions imposed must be left largely to the regulatory agency, and unless there are serious reasons for a limitation in the scope of the order, the courts will not interfere with the determination of the agency in that respect." *Wilson & Co.* v. *Benson*, 286 F. 2d 891, 896 (7th Cir. 1961).

But *this* case *did* disclose "serious reasons for a limitation in the scope of the order." The complaint

charged and the Commission ultimately proved one unusual transaction, which arose in a unique competitive situation involving one particular seller and one particular buyer. Nothing in the case remotely suggested a "generalized scheme" or pattern of violation to justify an omnibus order. Actually, until this Court's 5:4 decision in 1960 invalidated this transaction on the merits, it appeared perfectly proper within the legal labyrinth of the Robinson-Patman Act.[7]

Manifestly, the court below has not authorized any wholesale and indiscriminate rewriting of administrative orders to cease and desist, or misconceived the *Communications Workers* decision as establishing such a "rule of law." (Pet. 10)

The ruling of the Court of Appeals does symptomize a recurrent concern over the infinite scope of the typical omnibus FTC order. By "confounding rather than clarifying the respondent's legal duties, it inherently frustrates reasonable attempts in good faith to comply."[8] Moreover, such indefinite orders must inevitably "shift to the courts a responsibility in enforcement proceedings of trying issues * * * which Congress has primarily entrusted to the Commission." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 54 (1948).

Above all, boilerplate orders mock that "special

[7] Indeed, as FTC Commissioner Kern recently revealed, "The file was studied by the Antitrust Division, which concluded that the Court of Appeals was correct and the Commission was wrong, and it recommended that the Solicitor General not seek review by the Supreme Court." Remarks of William C. Kern, Commissioner, Federal Trade Commission, before the Mechanical Contractors Associations of Texas, Inc., p. 9, Jan. 14, 1961.

[8] Report of the Attorney General's National Committee to Study the Antitrust Laws 168 (1955).

competence" which Congress expected the Commission to exercise when "formulating remedies to deal with problems in the general sphere of competitive practices." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

2. Respondent Consistently Challenged the Premises Underlying the Omnibus Order to Cease and Desist

The Commission's cavil at the Court of Appeals' *power* to modify the order, in light of respondent's alleged waiver of its rights, is refuted by respondent's persistent challenges of the legal premises behind the FTC order at every stage of this controversy.

In the first place, the basis for the Commission's order was contested throughout the administrative proceeding, and put in issue before the Court of Appeals since 1958. Respondent from the outset (1) denied the Commission's charges at the administrative level (R. 6); (2) submitted a proposed order of dismissal to the Hearing Examiner (R. 173); (3) excepted before the Commission to the Examiner's adverse rulings (R. 203); (4) declined compliance with the Commission's order pending judicial review (R. 203, 211-212); and (5) filed a statutory petition praying that the order be set aside as defective, apart from the proceeding's substantive failings, because it was "vague, exceeds the statutory limits of Section 2(*c*), and as applied would conflict with the Sherman Act." (R. 214) The Court of Appeals set aside the Commission's order on several interrelated grounds (R. 224-225),[9] but was

[9] Before the Court of Appeals, the briefs treated the impact of the FTC's order on competition in food distribution, as well as the Commission's preoccupation with a picayune and isolated transaction affecting only the particular parties involved. (See Pet. Br. pp. 27-33, Reply Br. pp. 7, 14-16) Respondent expressly con-

in turn reversed by this Court's divided decision which remanded the proceeding for further appropriate action that culminated in the modification at issue today.

To be sure, respondent's post-remand motion in 1960 amplified the original challenge to the order once the merits had been determined by this Court.[10] The motion also advanced supervening legal developments since that court's original consideration of this case in 1958—principally this Court's *Communications Workers* decision in 1960 which directed modification of an omnibus Labor Board order, in the absence of a "generalized scheme" of dereliction. Respondent also pointed to the Commission's reinforced authority in 1959 to impose heavy fines for violation of final cease and desist orders, coupled with the admonition by Congress "to issue orders which are as definitive as possible."[11]

The Commission's claim that respondent nevertheless waived its rights to attack the scope of the order (Pet.

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tended, and the FTC disputed, that the sweeping terms of the original cease and desist order improperly barred normal competitive price reductions to *all* customers. (Reply Br. pp. 1, 7, 15; FTC Br. pp. 39-42) At no time did the FTC question the court's powers to consider these contentions in 1958.

[10] Whatever its relevance to this case, the doctrine which counsels appellate courts against entertaining particular arguments not specifically urged at the administrative level is flexible enough to accommodate countervailing considerations, including supervening legal developments presented at the earliest opportunity. *Hormel* v. *Helvering*, 312 U.S. 552, 556-558 (1941); cf. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941). And while the Court of Appeals formally modified the order on its "own motion," respondent may, of course, urge *any* argument in support of the judgment of modification. *E.g.*, *Langnes* v. *Green*, 282 U.S. 531, 539 (1931).

[11] S. Rep. No. 83, 86th Cong., 1st Sess. 3 (1959).

5-8) ignores the realities of this case—as epitomized by the petition's citation of *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. 654, O.T. 1960, as raising a "related question." (Pet. 2 n. 1) In that case, "No hearing was held, but a stipulation was filed in which both respondents admitted the charges and agreed to the entry of a broad order," and further "agreed that the appropriate Court of Appeals could enter decrees pursuant to the stipulation without notice, hearing or objection." 283 F. 2d 26, 28 (1st Cir. 1960). By contrast, *this* respondent at each stage fought the Commission's order, and challenged its premises at every turn.

The contention of waiver is even more startling since the courts have often revised unjustifiably sweeping FTC orders—*even in the absence of a specific prior challenge to the order's verbiage at the administrative level.*[12]

CONCLUSION

The instant modification of the Commission's omnibus order was obviously correct on its peculiar facts, and generates no public controversy deserving of Supreme Court review. As this Court recently observed, "One cannot generalize as to the proper scope of these orders. It depends on the facts of each case and a judgment as to the extent to which a particular violator

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[12] *Bork Mfg. Co.* v. *Federal Trade Commission*, 194 F. 2d 611 (9th Cir. 1952); *R. J. Reynolds Tobacco Co.* v. *Federal Trade Commission*, 192 F. 2d 535 (7th Cir. 1951); *Folds* v. *Federal Trade Commission*, 187 F. 2d 658 (7th Cir. 1951); *Parker Pen Co.* v. *Federal Trade Commission*, 159 F. 2d 509 (7th Cir. 1946); *Milk and Ice Cream Can Inst.* v. *Federal Trade Commission*, 152 F. 2d 478 (7th Cir. 1946); *Gelb* v. *Federal Trade Commission*, 144 F. 2d 580 (2d Cir. 1944); *Etablissements Rigaud, Inc.* v. *Federal Trade Commission*, 125 F. 2d 590 (2d Cir. 1942); *Standard Container Mfgrs.' Ass'n* v. *Federal Trade Commission*, 119 F. 2d 262 (5th Cir. 1941).

should be fenced in." *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392 (1959).

The FTC's professed "fears that the judgment entered in this case will have a serious and detrimental impact" on other proceedings (Pet. 11) is, in the end, a forensic spook. In the first place, the petition inaccurately asserts that FTC Clayton Act orders have "consistently" reached beyond the "particular parties involved" in the challenged transactions, since numerous Robinson-Patman orders by the Commission expressly bar discriminatory payments *only* to the specified recipients implicated in the record of administrative proceedings.[13] Furthermore, since the instant order was modified in November 1960, over a dozen omnibus cease and desist orders have issued under the Robinson-Patman Act,[14] unembarrassed by the ruling now ten-

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[13] *E.g.*, *Charles V. Herron*, 30 F.T.C. 445, 451 (1940); *Mississippi Sales Co.*, 30 F.T.C. 1282, 1297 (1940); *Reeves Parvin & Co.*, 28 F.T.C. 1429, 1444 (1939); *Quality Bakers of America*, 28 F.T.C. 1507, 1525 (1939); *American Oil Co.*, 29 F.T.C. 857, 866 (1939); *C. R. Anthony Co.*, 29 F.T.C. 922, 929 (1939), 30 F.T.C. 1103 (1940); *Fruit & Produce Exchange*, 30 F.T.C. 224, 233 (1939); *Golf Ball Mfgrs.' Ass'n*, 26 F.T.C. 824, 850 (1938); *Webb Crawford Co.*, 27 F.T.C. 1099, 1116 (1938); *Oliver Brothers, Inc.*, 26 F.T.C. 200, 214 (1937).

[14] Section 2(c) orders: *Bruce A. Graves*, Dkt. 8063 (April 13, 1961); *Thomasville Chair Co.*, Dkt. 7273 (March 15, 1961); *J. Segari & Co.*, Dkt. 8065 (Jan. 6, 1961); *A. R. Fiorita Fruit Co.*, Dkt. 8067 (Dec. 1, 1960); *National Fiorita Fruit Co.*, Dkt. 8055 (Nov. 23, 1960); Section 2(a) orders: *Faber Brothers, Inc.*, Dkt. 8062 (March 16, 1961); *Perfect Equipment Corp.*, Dkt. 7707 (Jan. 12, 1961); Section 2(d) orders: *Penick & Ford Ltd.*, Dkt. 8118 (April 12, 1961); *S. C. Johnson & Son, Inc.*, Dkt. 8177 (March 16, 1961); *Vanity Fair Paper Mills, Inc.*, Dkt. 7720 (March 15, 1961); *Simmons Co.*, Dkt. 8116 (March 3, 1961); *Chun King Sales, Inc.*, Dkt. 8093 (Jan. 12, 1961); *Shulton, Inc.*, Dkt. 7721 (Jan. 5, 1961); *Dennis Chicken Products Co.*, Dkt. 8091 (Dec. 21, 1960); *Ball Brothers Co.*, Dkt. 8092 (Dec. 21, 1960); *Kerr Glass Mfg. Corp.*, Dkt. 8096 (Dec. 7, 1960).

dered for review, while not one order has been limited on its account.

Nor *can* dire consequences result. For the Commission's Clayton Act proceedings typically concern a "generalized scheme" of discrimination, where broader injunction may well be appropriate to prevent future transgressions.[15]

If this Court nevertheless deems the decision below to warrant review, respondent respectfully suggests that it be set for argument immediately following No. 654, where the Court will review judicial controls of Labor Board orders.

Respectfully submitted,

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May 2, 1961

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[15] *E.g., Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429 (1957); *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 74

FEDERAL TRADE COMMISSION, PETITIONER

v.

HENRY BROCH AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The court of appeals rendered no opinion in modifying the order of the Federal Trade Commission. The opinion of the Commission (O.R. 204–211)[1] is reported at 54 F.T.C. 673. The prior opinion of the court of appeals (O.R. 218–224), and the opinion of this Court when the case was previously before it, are reported at 261 F. 2d 725 and 363 U.S. 166, respectively.

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[1] The Court granted a joint motion to use in this case the record in No. 61, October Term, 1959 (R. 53). We shall refer to that record as "O.R." and to the record in the present case as "R."

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1960 (R. 51), and on January 31, 1961, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Clark to April 1, 1961 (R. 52). The petition was filed on March 31, 1961, and was granted on May 15, 1961 (R. 53; 366 U.S. 923). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in narrowing *sua sponte* the scope of the Federal Trade Commission's cease-and-desist order, when respondent had not attacked the breadth of the order before the Commission.[2]

2. Whether the Commission exceeded the discretion vested in it to determine the relief appropriate and necessary to prevent further statutory violations when it prohibited respondent from engaging in conduct found to violate Section 2(c) of the Clayton Act, without confining the prohibition to transactions between the particular seller and buyer involved in the violations which the Commission had found.

STATUTE INVOLVED

Section 11 of the Clayton Act, as it existed prior to its amendment by the Act of July 23, 1959 (73 Stat.

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[2] A related question is presented in *National Labor Relations Board* v. *Ochoa Fertilizer Corporation, et al.*, No. 37, this Term, set for argument immediately before this case.

243), is the statute primarily involved (15 U.S.C. 21).[3] With immaterial exceptions, it authorizes the Federal Trade Commission to enforce compliance with Section 2 of the Act and provides that if the Commission has reason to believe that any person is violating or has violated any of its provisions, it shall issue a complaint stating its charges, and give notice of a hearing thereon. It further provides:

> If upon such hearings the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, * * * in the manner and within the time fixed by said order. * * *
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> * * * * * *
>
> Any party required by such order * * * to cease and desist from a violation charged may obtain a review of such order in [the] United States court of appeals by filing in the court a written petition praying that the order * * * be set aside. * * * Upon the filing of such petition the court shall have * * * jurisdiction to affirm, set aside, or modify the order * * *.

The substantive provision which the respondent violated is Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13. It provides:

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[3] Section 2 of the Act of July 23, 1959 (73 Stat. 245), makes the amendment inapplicable to review proceedings initiated prior to that date.

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

STATEMENT

In *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, this Court upheld the determination by the Commission that respondent Broch, while acting as a broker for Canada Foods, Ltd. ("Canada Foods") on sales made to the J. M. Smucker Company ("Smucker"), had violated Section 2(c) of the Clayton Act by granting allowances in lieu of brokerage to Smucker. On remand, the court of appeals on its own motion modified the Commission's cease-and-desist order by restricting the prohibitions against the payment or allowance of illegal brokerage to sales made by Broch to Smucker for Canada Foods. The questions now before the Court are (1) whether Broch's failure to challenge the scope of the order before the Commission precluded the reviewing court from considering the issue, and, if not, (2) whether the Commission's order is unduly broad.

The facts which are pertinent to these issues, as found by the Commission and accepted by the court of appeals in the earlier proceeding (O.R. 219), are as follows:

Broch is a broker or sales representative for approximately 25 principals, including Canada Foods, who sell food products (O.R. 175–176). Broch agreed to act for Canada Foods for a 5 percent commission (O.R. 14, 74, 127, 135, 149, 153, 178, 229). Canada Foods established a price for its 1954 pack of apple concentrate at $1.30 per gallon and authorized its several brokers, including Broch, to negotiate sales at that price (O.R. 108, 114, 144–145, 179). Smucker, a buyer of apple concentrate, insisted on a price of $1.25 for a large order (O.R. 179–183). Canada Foods was willing to meet Smucker's price only if Broch agreed to cut its brokerage on sales made to Smucker to 3 percent, which would result in Broch and Canada Foods sharing equally in the price concession to Smucker. Broch agreed, and the sale was made (O.R. 183–185, 231).

The reduced price of $1.25 was granted to Smucker on all sales during the 1954–1955 season and continued through the 1955–1956 season up to the time the hearings in this matter were closed in October 1956 (O.R. 81–82, 149–150, 185, 200, 201). But on Canada Foods' sales to all other customers, the price continued to be $1.30 and in each instance Broch received its regular 5 percent commission (O.R. 149–150, 185).

On these facts, the Commission held that Broch had violated Section 2(c) of the Clayton Act, and entered

an order (O.R. 202, 211) directing Broch, "in connection with the sale of food or food products for Canada Foods Ltd., or any other seller principal," to cease and desist from

> (1) Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, *or to any other buyer,* or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. *or any other seller principal,* as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage service; or
>
> (2) In any other manner, paying, granting or allowing, directly or indirectly, to the J. M. Smucker Company, *or to any other buyer,* or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products to such buyer for its own account.*

The court of appeals set aside the order upon the grounds that Section 2(c) does not apply to a seller's

* Italics supplied.

broker, and that Broch had not granted part of his commission, or an allowance in lieu thereof, to the buyer (O.R. 218–225). This Court, however, reversed both rulings. 363 U.S. 166.

Following the remand, Broch filed a motion which sought, *inter alia*, a modification of the order.[5] It contended that the order was too broad because it "purports to reach transactions by respondent without limitation on behalf of *any* seller with *any* buyer beyond the specific parties involved in this case" (R. 28, emphasis in original; see R. 26), and because it prevents Broch from engaging in certain conduct not found to be illegal (R. 25–26). The Commission's answer (R. 30–38) stated (R. 35) that the agency had adopted the order proposed in the hearing examiner's initial decision; that under the Commission's rules of practice an appeal from an initial decision is to be in the form of a brief, which must list the questions to be argued; and that Broch had raised no issue during the appeal proceedings before the Commission, as to the scope of the order. The Commission urged that the motion to modify should be denied under the established principle that a court called upon to review an order of an administrative agency may not consider an issue which had not been raised before the agency (R. 35–37). The answer also stated that, since Broch had made no argument to the court of appeals on this issue prior to the remand, it must be deemed

[5] The motion also asked the court to set aside the order on the ground that the Commission had failed to consider certain factors, the relevancy of which this Court had allegedly not determined (R. 22–25).

to have waived the point (R. 36–37). The Commission requested an opportunity to be heard in defense of the scope of the order on the merits if the court should decide that the merits were open for consideration (R. 37–38).

In its reply Broch characterized the Commission answer as resorting to "groundless technicalities" to preclude review of an "unduly restrictive injunction" based on a transaction "considered entirely lawful by this Court and four Justices of the Supreme Court" (R. 49).

The court thereupon entered an order which recited the foregoing pleadings and denied Broch's motion to modify (R. 51). However, "[o]n the court's own motion" it modified the Commission's order by deleting the words "or any other seller principal" and "or to any other buyer," and affirmed the order as so modified (R. 51–52). The modification restricted the prohibitions of the order to transactions in which Canada Foods was the seller and Smucker was the buyer—precisely the relief sought by Broch's motion to modify.

SUMMARY OF ARGUMENT

I

1. When this case was before the Federal Trade Commission, the respondent raised no objection to the scope of the order proposed by the hearing examiner in his initial decision. That order was entered by the Commission. Not only did respondent have adequate opportunity to challenge the breadth of the order on its appeal from the initial decision to the Commis-

sion, but the Commission's rules of practice required it to do so if it wished to raise the issue. In these circumstances, judicial modification of the scope of the order was foreclosed by the settled rule that issues not raised before an administrative agency are not open before the reviewing court. *Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, 414; *Federal Power Commission* v. *Colorado Interstate Gas Co.,* 348 U.S. 492, 498–501; *United States* v. *Tucker Truck Lines,* 344 U.S. 33, 37; *National Labor Relations Board* v. *Cheney California Lumber Co.,* 327 U.S. 385, 389.

While many of the decisions applying the rule were rendered under statutes which specifically bar judicial consideration of objections not made before the agency, the principle is not limited to such statutes. In both the *Tucker* and the *Moog* cases, *supra,* this Court held, under statutes which contain no explicit prohibition, that a reviewing court could not consider objections not raised before the agency.

The principle is no less applicable to objections to the form or scope of the order than to substantive issues. Indeed, since the rule is based upon the policy that an agency should have the initial opportunity to consider matters within its jurisdiction, its application is particularly appropriate when the challenge is to the scope of the order. For the "specialized, experienced judgment" that an agency must bring to bear "in the shaping of its remedies within the framework of regulatory legislation" (*Moog, supra* at 413) is equally necessary for evaluation of the claim that

narrower relief than has been proposed will nevertheless be adequate to protect the public interest.

2. The court of appeals apparently recognized the validity of the Commission's argument that the respondent's failure to question the scope of the order before the agency barred it from raising the issue on judicial review. For the court denied the respondent's motion to modify. The court, however, accomplished the identical result by making, on its own motion, the very modifications which it held the respondent itself could not directly seek. Such action was improper. This Court has held that the policy reflected in statutory provisions prohibiting the court from considering objections not urged before the agency would be "seriously undermine[d]" by permitting the reviewing court *sua sponte* to consider such objections. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 499; *National Labor Relations Board* v. *United Mine Workers*, 355 U.S. 453, 457, 463–464. The rule, however, is not limited to such statutes and the policy upon which it is based would be equally "seriously undermine[d]" by *sua sponte* judicial action even though the statute does not expressly forbid it.

3. We recognize that a reviewing court is not absolutely barred from considering objections to the scope of the order that have not been made before the agency. If, for example, the agency acted wholly beyond its statutory authority, a court may properly modify the order to confine it within that limit. In the present case, however, the objection to the scope of the Commission's order is not that the agency may

never, as a matter of law, extend such an order beyond the particular persons involved in the violations found, but only that the broad order is unwarranted by the facts of this case. That contention, however, raises an issue addressed to the Commission's discretion, and is the kind of objection that must be made to the agency as a prerequisite to judicial review.

A litigant's failure to raise an issue before the agency may be excused if there were reasonable grounds therefor. Here, however, respondent has offered no excuse for its failure to do so, and there was in fact none. The fact that respondent challenged the "basis" for the Commission's order (Br. in Op. 10) does not excuse its failure to challenge the scope of the order. A party must give the agency "adequate notice that it intends to press the specific issue it now raises" (*National Labor Relations Board* v. *Seven-Up Co.*, 344 U.S. 344, 350), and an attack upon the legal basis of the order is not "adequate notice" to the agency of the "specific issue" that, if any order is to be issued, it should be restricted to the particular parties involved and the violations found. Nor can respondent justify its failure to raise the issue before the Commission on the ground of alleged "supervening legal developments" (Br. in Op. 11), primarily, this Court's decision in *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479, which modified a Labor Board order. Even an intervening judicial decision that announces new law does not authorize a reviewing court to entertain an objection not raised in the administrative proceedings (*Tucker Truck Lines, supra*). The *Com-*

munications Workers case did not enunciate any new legal doctrine, but merely held that, under settled principles governing the scope of administrative orders, the facts in that case did not justify the order.

II

If, contrary to our contention, the Court of Appeals was authorized to consider objections to the scope of the Commission's order not raised before the agency, the court erred in limiting the order to sales by respondent on behalf of Canada Foods to Smucker. The Commission has "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" (*Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 611). It did not abuse that discretion in concluding that the order should prohibit respondent from engaging in illegal brokerage transactions with all purchasers on behalf of all sellers.

1. The Commission found that Broch had made illegal allowances in lieu of brokerage by accepting less than its agreed-upon rate of commission in order to consummate a large initial sale to a particular buyer at a lower price than was given to any other purchaser by the seller. The reduced price was given on subsequent sales. Having found these violations, the Commission was fully justified in prohibiting Broch from engaging in such illegal practices generally. The alternative to such an order—one that merely applied the prohibition to transactions with Smucker for Canada Foods—would not effectively "cure the ill effects of the illegal conduct and assure the public freedom from its continuance" (*United States v. United*

States Gypsum Co., 340 U.S. 76, 88). The Commission's order here is no more sweeping than numerous orders and decrees that have been upheld against the challenge that they went too far because not confined to the particular parties, localities or products to which the evidence of illegal conduct related. *E.g.*, *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 728–730; *United States Gypsum Co., supra*, p. 90.

2. *Communications Workers of America* v. *National Labor Relation Board*, 362 U.S. 479, where this Court modified a Labor Board order directed against unions to limit its prohibition to the particular employer involved, does not justify the modifications of the Commission's order made by the court of appeals. This Court held in *Communications Workers* that, on the facts of that case, there was "neither justification nor necessity for extending the coverage of the order generally" to cover "any other employer", and modified the order by eliminating those words (pp. 480–481). *Communications Workers* did not enunciate any new principle limiting the permissible scope of agency orders, or hold that a broad order is justified only if the record discloses a "generalized scheme" (p. 481) of law violation. On the contrary, the case turned on its particular facts. In the present case, an order that merely prohibits illegal brokerage on sales by Broch for Canada Foods to Smucker would not adequately protect the public interest, and the broader order entered by the Commission was both justified and necessary.

ARGUMENT

I

THE COURT OF APPEALS ERRED IN NARROWING SUA SPONTE THE SCOPE OF THE COMMISSION'S ORDER, WHERE RESPONDENT HAD MADE NO OBJECTION TO THE BREADTH OF THE ORDER DURING THE ADMINISTRATIVE PROCEEDINGS

1. When this case was before the Federal Trade Commission, the respondent raised no objection to the scope of the order. The order entered by the Commission was the identical order proposed by the hearing examiner in his initial decision. Not only did respondent have adequate opportunity to challenge the breadth of the order on its appeal from the initial decision to the Commission, but the Commission's Rules of Practice required it to do so if it wished to raise the issue.

Section 3.22(b) of the Commission's Rules then in effect * (16 CFR 3.22, R. 45) provided that "the appeal [from an initial decision] shall be in the form of a brief," which "shall contain * * * (iii) A list of the questions involved and to be argued; and (iv) An argument presenting clearly the points of fact and law relied upon in support of the position taken on each question * * *." The rule further stated that "Material not included in the appeal may not be presented to the Commission in oral argument or otherwise." Respondent's appeal brief (R. 1–20), which

* The Commission's rules of practice governing adjudicatory proceedings were amended, effective July 21, 1961. 26 Fed. Reg. 6016.

under the rules constituted the specification of errors, raised no issue, either in the statement of questions involved or in the argument, as to the scope of the proposed order. On the contrary, the only issues it raised and argued were the substantive questions whether respondent's acts violated Section 2(c) and whether the proceeding furthered the public interest (see App., *infra*, pp. 39–40.)

In these circumstances, judicial modification of the scope of the order was foreclosed by the settled rule that issues not raised before an administrative agency are ordinarily not open before the reviewing court. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414; *National Labor Relations Board* v. *District 50, United Mine Workers of America*, 355 U.S. 453, 463–464; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498–501; *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37; *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143, 155; *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 389; *United States* v. *Northern Pacific R. Co.*, 288 U.S. 490, 494.

While many of those decisions were rendered under statutes which specifically bar judicial consideration of objections not made before the agency, the principle is not limited to statutes which so provide. Thus, in *United States* v. *Tucker Truck Lines, supra*, the Court held that a litigant's failure to challenge the qualification of a hearing examiner before the Interstate Commerce Commission barred it from sub-

sequently raising the issue in court, even though an intervening decision of this Court had held that such an examiner was not qualified. The Interstate Commerce Act, like the Federal Trade Commission Act, does not in terms require the raising of issues before the agency as a prerequisite to judicial consideration. Yet the Court did not deem that fact significant. It stated (344 U.S. at 36–37, footnotes omitted):

> * * * We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts * * * Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

In *Moog Industries* v. *Federal Trade Commission, supra,* the Court applied this principle in holding that the court of appeals had properly refused to postpone the effective date of a Commission cease-and-desist order directed against one company, until the agency had entered similar orders against the company's competitors. The Court held (355 U.S. at 414)—

> If the question has not been raised before the Commission * * * a reviewing court should not in any event entertain it.

The principle is no less applicable to objections to the form or scope of the order than to substantive issues. *National Labor Relations Board* v. *District 50, United Mine Workers,* 355 U.S. 453, 457–458; *National Labor Relations Board* v. *Cheney California Lumber Co.,* 327 U.S. 385; *National Labor Relations Board* v. *Enterprise Ass'n,* 285 F. 2d 642, 646 (C.A. 2). Indeed, the policy which underlies the rule—the desirability of giving the agency the initial opportunity to consider matters within its jurisdiction (see *infra,* p. 18)—makes the application of the rule particularly appropriate when the challenge is to the scope of the order. For the "specialized, experienced judgment" that an agency must bring to bear "in the shaping of its remedies within the framework of regulatory legislation" (*Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, 413) is equally necessary for evaluation of the claim that narrower relief than has been proposed will nevertheless be adequate to protect the public interest. Since this is a judgment that "calls for the application of technical knowledge and experience not usually possessed by judges" (*Federal Power Commission* v. *Colorado Interstate Gas Co.,* 348 U.S. 492, 501), it is necessarily one that lies especially within the province of the agency that is expert in the field.

The requirement that timely objection be made before the agency is, of course, a particularized application of the general principle of exhaustion of administrative remedies. The principle, as explained in the Senate committee report on the bill that be-

cause the Administrative Procedure Act (S. Doc. No. 248, 79th Cong., 2d Sess., p. 289, n. 21), is that—

> A party cannot wilfully fail to exhaust his administrative remedies and then, after the agency action has become operative, * * * resort to court without having given the agency an opportunity to determine the questions raised. If he so fails he is precluded from judicial review by the application of the time-honored doctrine of exhaustion of administrative remedies. * * *

Thus, where Congress has committed matters to an administrative agency, "orderly procedure and good administration require" that timely objections be made before the agency "while it has opportunity for correction in order to raise issues reviewable by the courts" (*Tucker Truck Lines, supra*). Otherwise, the agency is denied the opportunity to correct any error it has made, and thus to avoid the need for judicial review; the reviewing court is denied the benefit of the agency's expert judgment on matters committed to it by Congress; and litigants are encouraged to withhold objections from the agency for the purpose of creating issues for judicial review. The rule requiring the raising of objections before an agency is thus grounded on fundamental considerations of public interest and sound judicial administration. On the other hand, there is no unfairness in requiring a litigant to raise all his contentions before the agency—particularly where, as here, the agency's Rules of Practice explicitly state that "Material not included in the appeal may not be presented to the Commission * * *."

In practice the Commission does address itself to the scope of a proposed order on appeal from the trial examiner's decision even though the respondent does not raise the point specifically. Indeed, the Commission has modified an unduly broad order even though the respondent consented to its scope. *Automatic Canteen Co.*, 46 F.T.C. 861, 897, affirmed, 194 F. 2d 433 (CA 7), reversed on other grounds, 346 U.S. 61. In the present case the Commission concluded that the order recommended by the examiner was the proper remedy. This practice gives assurance that the Commission will not enter an order which is beyond its power or unjustly restrictive, but it is not a substitute for a particularized objection by the respondent which would focus attention upon any objection to the scope of the order, enable the Commission to consider and meet the specific point, and invite additional evidence and new consideration if necessary. The respondent's failure, in this case, to particularize its objection, as the Commission's Rules require, bars it from raising the point upon judicial review.

2. The court of appeals apparently recognized the validity of the Commission's argument upon this point, for it denied the respondent's motion to modify, but it accomplished the identical result by making, on its own motion, the very modifications which it held the respondent itself could not directly seek. In so doing, the court exceeded the limits of permissible judicial review.

This Court has held that, under statutes specifically prohibiting the court from considering objections not

urged before the agency, the court cannot *sua sponte* consider such objections. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498–501; *National Labor Relations Board* v. *United Mine Workers*, 355 U.S. 453, 457, 463–464. In the *Colorado* case, the Court pointed out (p. 499) that the statutory provision there involved (Section 19(b) of the Natural Gas Act) "reflects the policy that a party must exhaust its administrative remedies before seeking judicial review. To allow a court of appeals to intervene here on its own motion would seriously undermine the purpose of the explicit requirements of § 19(b) that objections must first come before the Commission." As we have shown (*supra*, pp. 15–16), the rule barring judicial consideration of objections not raised before the agency is not limited to statutes which specifically so provide. The policy precluding challenges to an agency order upon a ground not presented to the agency would be equally "seriously undermine[d]" (*Colorado Gas, supra*) by *sua sponte* judicial action under a regulatory statute which does not contain an express prohibition.

3. We recognize, of course, that a reviewing court is not absolutely barred from considering objections to the scope of the order that have not been made before the agency. If, for example, the agency "has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce" (*National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388), a court may properly modify the order to confine it within the

limits of the agency's authority. In the instant case, however, the objection to the order was not that the Commission may never, as a matter of law, extend the prohibitions of an order under Section 2(c) beyond the particular persons involved in the violations found. Such a position would plainly be untenable, as respondent apparently recognized (R. 28). The contention here was only that the broad order was not warranted by the facts of this particular case, *i.e.*, that the record did not justify a prohibition on illegal brokerage transactions with all persons, rather than just with Canada Foods and Smucker. That contention, however, related to the exercise of the Commission's discretion, and it is the kind of objection that must be made to the agency as a prerequisite to judicial review.

A litigant's failure to raise an issue before the agency may be excused if there were reasonable grounds therefor.[7] Here, however, the respondent

[7] Most of the cases which respondent cites for its statement (Br. in Opp. 12, emphasis in original) that "the courts have often revised unjustifiably sweeping FTC orders—*even in the absence of a specific prior challenge to the order's verbiage at the administrative level*," fall within this category. They were cases in which there was no occasion to raise the objection before the agency, either because there was no initial decision by the hearing examiner and the Commission's order was the only order subject to challenge (*Bork Mfg. Co.*, FTC Docket No. 5525, *Bork Mfg. Co.* v. *Federal Trade Commission*, 194 F. 2d 611 (C.A. 9)), or because the examiner's ruling was in favor of the respondent and there was therefore no proposed order to challenge before the Commission (*Folds*, FTC Docket No. 5332, *Folds* v. *Federal Trade Commission*, 187 F. 2d 658 (C.A. 7); *Milk and Ice Cream Can Inst.*, FTC

"did not offer nor did the court require any excuse for its failure to raise the objection" (*United States* v. *Tucker Truck Lines*, 344 U.S. 33, 35) during the administrative proceedings. Respondent was fully aware of the order proposed by the examiner; it had adequate opportunity to challenge its scope on the appeal from the initial decision; and it was on notice that, if it wished to do so, it was required to raise the issue. Indeed, respondent did not even raise the issue in its initial presentation to the court of appeals, either in its petition for review* or in its

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Docket No. 4551, *Milk and Ice Cream Can Inst.* v. *Federal Trade Commission*, 152 F. 2d 478 (C.A. 7); *Etablissements Rigaud, Inc.*, FTC Docket No. 3337, *Etablissements Rigaud, Inc.* v. *Federal Trade Commission*, 125 F. 2d 590 (C.A. 2). (Neither the statutes which the Commission administers, nor the Commission's Rules of Practice, require petitions for rehearing before a matter initially raised in the Commission's final decision can be presented on appeal.)

In at least one of the other cases, objection to the scope of the order was specifically made before the Commission (*Reynolds Tobacco Co.*, FTC Docket No. 4795, *R. J. Reynolds Tobacco Co.* v. *Federal Trade Commission*, 192 F. 2d 535 (C.A. 7). In one case the modification merely clarified the order to conform it to the Commission's intention (*Standard Container Mfgrs.' Ass'n.* FTC Docket No. 3289; *Standard Container Mfrs.' Ass'n* v. *Federal Trade Commission*, 119 F. 2d 262 (C.A. 5)). In the remaining cases, the modifications either were immaterial or were based upon reversal of the finding upon which the changed portion of the order rested (*Folds, supra; Parker Pen Co.* v. *Federal Trade Commission*, 159 F. 2d 509 (C.A. 7); *Gelb* v. *Federal Trade Commission*, 144 F. 2d 580 (C.A. 2)).

*The petition to review (O.R. 212-215) stated seven grounds for relief, only one of which even dealt with the order. The seventh ground was that "The order of the Commission is defective in that it is vague, exceeds the statutory limits of Sec-

briefs.[9] It first made the contention in its motion to vacate, more than four years after the order had first been proposed by the examiner, and only after this Court had upheld the Commission on the merits. Here, as in *Tucker Truck Lines, supra*, "The issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings * * *" (344 U.S. at 36).

It is no answer to say, as respondent does (Br. in Opp. 10, emphasis added), that "the *basis* for the

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tion 2(c), and as applied would conflict with the Sherman Act" (O.R. 214). The latter two claims are no more than a restatement of respondent's basic contention that the Commission had misinterpreted Section 2(c). The first claim—that the order is "vague"—did not raise the point that the order should be restricted to the particular buyer and seller involved in the case. The basis upon which respondent sought such a restriction was not that the broader order was "vague," but that it was unjustified by the violations shown.

The fact that the respondent did not challenge the scope of the order in its petition to review distinguishes this case from the recent decision of the Second Circuit in *Swanee Paper Corporation* v. *Federal Trade Commission*, 291 F. 2d 833. In *Swanee* the court considered a challenge to the breadth of the order, not made before the agency, which it held had been raised in the petition for review. The court ruled that, under the 1959 amendments to the Clayton Act, the Commission could have then modified the order. The 1959 amendments authorize the Commission to modify its order before the record has been filed in the court of appeals (15 U.S.C. (Supp. II) 21(b))—an authority not contained in the Act as it existed at the time of this case.

[9] Respondent's briefs in the court of appeals raised no issue with respect to the scope of the order, either in the statement of the eight "Contested Issues" (see App. *infra*, pp. 41–42), in the "Propositions and Authorities" relied upon, or in the argument. Copies of those briefs have been lodged with the Clerk.

Commission's order was contested throughout the administrative proceeding." That is but another way of stating that throughout the proceedings respondent contended that it had not violated the Act. A challenge to the legal basis of the order, however, is not the same thing as a challenge to its scope. The former questions whether any order at all should be entered, while the latter assumes that some order is proper but questions the propriety of the particular order proposed. Since the reason for requiring a party to raise an issue before the agency is to give the latter an opportunity to consider and determine the objection, the party must give the agency "adequate notice that it intends to press the specific issue it now raises" (*National Labor Relations Board* v. *Seven-Up Co.*, 344 U.S. 344, 350; see, also, *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498, and *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255). An attack on the legal basis of the order is not "adequate notice" to the agency of the "specific issue" that, if any order is to be entered, it should be restricted to the particular parties involved in the violations found.

Nor can respondent justify its failure to raise the issue before the Commission on the ground of "supervening legal developments" (Br. in Opp. 11). Respondent cites *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479 (discussed *infra*, pp. 35–37), which modified a Labor Board order directed against unions to limit its prohibitions to the

particular employer involved,"[10] as an unforeseen development, but the failure to anticipate that decision plainly does not excuse respondent's failure to challenge the scope of the order before the Commission. *First*, this Court has previously held, in circumstances far stronger than the present case, that even an intervening judicial decision announcing new law does not authorize a reviewing court to entertain an objection not raised in the administrative proceedings. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36; cf. *Sunal* v. *Large*, 332 U.S. 174.[11] *Communications*

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[10] Respondent also relies (Br. in Opp. 11) upon the 1959 amendments to the Clayton Act, which gave the Commission "reinforced authority * * * to impose heavy fines for violation of final cease and desist orders * * *." Those amendments, however, have been held inapplicable to orders entered prior to their effective date. *Sperry Rand Corporation* v. *Federal Trade Commission*, 288 F. 2d 403 (C.A.D.C.). The order in this case was entered in 1957.

[11] In the *Tucker* case, the hearing examiner who conducted the proceedings before the Interstate Commerce Commission had not been appointed pursuant to Section 11 of the Administrative Procedure Act. After the administrative proceeding had been completed, and while the matter was pending before the reviewing court, this Court held that examiners hearing such cases had to be so appointed. *Ries & Co.* v. *United States*, 341 U.S. 907. This Court held in *Tucker*, however, that the litigant's failure to challenge before the Commission the examiner's qualification barred the reviewing court from entertaining the objection. *Tucker* was thus a far stronger case than this one for excusing the failure to raise the issue before the agency. For in *Tucker* the claim was that "if the appointment of the hearing examiner was irregular, the Commission in some manner lost jurisdiction and its order is totally void" (344 U.S. at 33). In the instant case, however, there is no such jurisdictional claim, but only the factual argument that the broad order is not justified by the record.

Workers did not purport to change that rule. See *National Labor Relations Board* v. *Enterprise Ass'n*, 285 F. 2d 642, 646–647 (C.A. 2). While no objection was made before the Board in *Communications Workers* to the scope of the order, the reason was that the union had prevailed before the hearing examiner, and therefore had no occasion to challenge the scope of the order before the agency (Record No. 418, O.T., 1959, pp. 64–65, 69).[12] In the instant case, however, respondent had lost before the examiner, and had full opportunity to challenge the order before the agency. *Second*, the *Communications Workers* case did not enunciate any new legal doctrine. It merely held that, under the usual principles governing the scope of administrative orders, the facts in that case did not justify the order (see *infra*, pp. 35–37). The decision was clearly foreshadowed by such cases as *National Labor Relations Board* v. *Express Pub. Co.*, 312 U.S. 426. Nothing in the *Communications Workers* decision provided respondent with any new ground for challenging the scope of the Commission's order, which was not already available to him during the administrative proceedings in this case.

[12] The provision of the Board order which this Court eliminated as too sweeping in *National Labor Relations Board* v. *Express Pub. Co.*, 312 U.S. 426, was in somewhat different form from that proposed by the examiner. The respondent before the Board did, however, challenge the scope of the order in its exceptions to the examiner's report. Record, No. 442, O.T., 1940, Vol. I, pp. 39–40, 47, 71–72.

II

THE COMMISSION DID NOT ABUSE ITS DISCRETION IN PROHIBITING BROCH FROM ENGAGING IN ILLEGAL BROKERAGE IN ITS DEALINGS WITH ALL BUYERS AND SELLERS, RATHER THAN LIMITING THE PROHIBITION TO THE PARTICULAR BUYER AND SELLER INVOLVED IN THE VIOLATIONS FOUND

If, contrary to our contention, the court of appeals was authorized to consider objections to the scope of the Commission order not raised before the agency, the court erred in modifying the order to limit its prohibitions to sales to Smucker by respondent on behalf of Canada Foods.

The principles governing the scope of Commission cease-and-desist orders and the limited extent of judicial review thereof are too well settled to require elaboration. The Commission has "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices". *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428–429. In exercising its "specialized, experienced judgment * * * in the shaping of its remedies" (*Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413), the Commission not only may "appraise the facts of the particular case" but also may "draw from its generalized experience" (*Siegal, supra*, p. 614). It is "not required to limit

its prohibition to the specific" violation found but "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Ruberoid Co., supra,* 343 U.S. 473, 474; *National Lead Co., supra,* 352 U.S. at 429. Judicial review in this area is "limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. * * * [T]he courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist" (*Siegel, supra,* pp. 612, 613; *Federal Trade Commission* v. *Mandel Brothers,* 359 U.S. 385, 393).

Under these principles, the Commission did not abuse its "wide discretion in its choice of a remedy" (*Siegel, supra*) in concluding that the order in this case should prohibit respondent from engaging in the illegal brokerage transactions with all purchasers on behalf of all sellers, rather than only with the particular buyer and seller involved in the violations found.

1. The record shows that Broch, acting as a broker on behalf of 25 seller principals, makes substantial sales of food products to customers in various states (O.R. 175–176). Although Broch had agreed with Canada Foods that its commission would be five percent on all sales (O.R. 14, 74, 127, 135, 149, 153), it accepted a commission of three percent in October 1954, in order to consummate a large sale to a particular buyer at a lower price than was given to any other purchaser by Canada Foods (O.R. 149–150, 183–185).

The reduced price (accomplished in part through a reduction in Broch's brokerage) was given to the particular favored purchaser (Smucker) on all subsequent sales consummated through Broch in December 1954, in 1955, and up to the time the hearings in this case were closed in October 1956 (O.R. 185). The Commission held, and this Court agreed, that such conduct by Broch constituted an illegal allowance in lieu of brokerage that was prohibited by Section 2(c) of the Clayton Act.

Having found such violations, the Commission realistically had two choices as to the type of remedy. It could either have prohibited Broch from engaging in such illegal transactions generally, or it could have limited the prohibition to transactions with Smucker on behalf of Canada Foods. The Commission chose the broad remedy. The order (O.R. 202) prohibited Broch, in connection with the sale of food or food products for Canada Foods "or any other seller principal," from (1) paying, granting or allowing to Smucker "or to any other buyer"—

> any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage service;

or (2) "In any other manner, paying, granting or allowing" to Smucker "or to any other buyer * * * anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products to such buyer for its own account."

Paragraph (1) prohibits the violation in the precise form in which Broch committed it. Paragraph (2) prohibits Broch, "[i]n any other manner," from accomplishing the same illegal result, *i.e.*, paying or allowing a portion of its brokerage to a favored customer. Paragraph (2) is a reasonable exercise of the Commission's authority "effectively to close all roads to the prohibited goal"; "the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past" (*Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473).[13]

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[13] Respondent argues (Br. in Opp. 7–8) that, in two respects, the order prohibits conduct that is permissible under Section 2(c). Neither argument is valid; in any event, such invalidity would not justify the sweeping modification of the order made by the court of appeals.

1. Respondent contends (Br. in Opp. 7, emphasis in original) that it would violate the order "[i]f any future reduction in [its] brokerage commission by the seller were 'passed on' as a *uniform* price 'allowance' * * * to *all* customers." But "the order in its relation to the circumstances of this case" (*Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 52; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 423–425), plainly does not forbid this conduct. As this Court expressly noted (363 U.S. at 175–176), both the Hearing Examiner (O.R. 198–199) and the Commission (O.R. 209–210) made it clear that

The court of appeals modified the order by striking the words "or any other seller principal" and "or to any other buyer." The effect was to limit the prohibitions to sales by Broch for Canada Foods to Smucker. It leaves Broch free to engage in the same or related violations even on behalf of Canada Foods with any other buyer, or even with Smucker on behalf of any other seller.

Such a limited order would not effectively "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88), and the Commission was justified in adopting the broader order. The Commission was not required to leave Broch free to commit similar violations with any other sellers or purchasers. Rather, the Commission could properly weigh all the circumstances—including the

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not every reduction in brokerage accompanied by a reduction in price automatically constitutes a violation.

2. The other contention (Br. in Opp. 8) is that the order might preclude respondent, if it were charged with violation, from showing certain circumstances that might allegedly be a defense, such as that a reduction in brokerage was made because the buyer performed services ordinarily performed by the broker. But there is nothing in the order indicating that any such circumstances, to the extent they might be relevant, would not be considered in determining whether the order had been violated. Should such "hypothetical situations * * * rise up to plague" respondent, "they can be presented to the Commission in evidentiary form rather than as fantasies." *Federal Trade Commission* v. *National Lead Co.*, *supra*, 352 U.S. 419, 431.

nature of Broch's business and of the food brokerage business generally, the type of violation found, the wilfulness of the violation, the relationships between Broch and its customers—and conclude that the particular violation found was not unique or limited to Broch's dealings with Canada Foods and Smucker, but was of a kind likely to be repeated in other transactions if not prohibited. In these circumstances, it would give the public inadequate protection if the Commission were required to institute a new proceeding, and to enter a separate order, each time that a broker violates the law with a different principal or customer. Broch cannot properly complain because, having violated Section 2(c) in its dealings with a particular seller and buyer, it is prohibited from repeating such violations with other buyers and sellers as well. "[T]hose caught violating the Act must expect some fencing in" (*Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431).

The Commission's order here is no more sweeping than numerous orders and decrees that have been upheld against the challenge that they went too far because not confined to the particular parties, localities, or products to which the evidence of illegal conduct related. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 728–730; *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 90; *Wilson & Co.* v. *Benson*, 286 F. 2d 891, 896 (C.A. 7); *Maryland Baking Co.* v. *Federal Trade Commission*, 243 F. 2d 715, 718 (C.A. 4); *Hershey Choc. Corp.* v. *Federal Trade Commission*, 121 F. 2d 968, 971–972 (C.A. 3);

Eugene Dietzgen Co. v. *Federal Trade Commission*, 142 F. 2d 321, 329–330 (C.A. 7). Cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 474–475.

In the *Cement Institute* case, *supra*, the respondents had combined among themselves to restrain competition through the use of a basing-point pricing system. Respondents objected to the provision in the Commission's order which would prevent them from engaging in the prohibited conduct with "others not parties hereto." In rejecting this objection, the Court noted not only that cement producers had secured the aid of non-parties in carrying out their program, but also that "the construction of new mills * * * may be reasonably anticipated." 333 U.S. at 728–729. The Commission was therefore "authorized to make its order broad enough effectively to restrain respondents from combining with others as well as among themselves." *Id.* at 729. Similarly, in the present case the mere fact that the evidence did not relate to illegal conduct in transactions involving parties other than the particular seller and the particular buyer does not limit the Commission's authority "to make its order broad enough effectively to restrain" Broch's illegal conduct in transactions with such other parties. For, as this Court said in rejecting the objections to the order in *Cement Institute*, "the prohibitions in the order forbid no activities except those which if continued would directly aid in perpetuating the same old unlawful practices." *Id.* at 727.

The statement of this Court in *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 90, in ap-

proving a Sherman Act decree not confined to the particular geographical area to which the evidence related, applies with equal force here (with the necessary change from geographical areas to parties):

> The complaint of * * * violation was restricted to the eastern territory of the United States. The evidence applied only to that area. However, the close similarity between interstate commerce violations * * * in eastern territory and western territory seems sufficient to justify the enlargement of the geographical scope of the decree to include all interstate commerce. * * *

Similarly, in the *Wilson & Company* case, *supra*, the court below refused to modify an order of the Secretary of Agriculture directed against discriminatory pricing activities by a meat packer, where modification was sought on the ground that although the practices involved only the packer's "relatively small and local San Francisco hotel supply business," the order covered "its sales of meat and meat food products throughout the United States" (286 F. 2d at 896).

The lack of any explanation in the Commission's opinion for the scope of the order throws no doubt upon its validity. The broad order was proposed by the examiner. Since respondent, in its appeal to the Commission from the examiner's proposals, made no objection to the breadth of the order, the Commission was warranted in assuming that it was not contesting that issue. Accordingly, there was no occasion for the Commission to articulate why it was following its customary practice under Section 2(c) of issuing an

order not restricted to the particular parties involved in the violations found. If respondent had objected before the Commission to the scope of the order, the agency could then have focussed upon the particular objections, and explained the reasons for the order ultimately adopted. (See Point I, *supra*, pp. 14–27.)

2. *Communications Workers of America* v. *National Labor Relations Board*, 362 U.S. 479, upon which respondent primarily relies (Br. in Opp. 7–9; R. 26–28), does not justify the modifications of the Commission's order made by the court of appeals. In that case the Labor Board had found that a local union whose members were employees of Ohio Consolidated Telephone Co., and the national union of which the local was a member, had committed acts constituting unfair labor practices in the course of a strike by employees of Ohio Consolidated. The Board's cease-and-desist order ran against both unions, and prohibited improper coercion of the employees of Ohio Consolidated "or any other employer". This Court, noting that neither union was "found to have engaged in violations against the employees of any employer other than Ohio Consolidated," and that there was no "generalized scheme" to engage in illegal activities "against all telephone employers," held that there was "neither justification nor necessity for extending the coverage of the order generally by the inclusion therein of the phrase 'any other employer,'" and modified the order by eliminating those words. Pp. 480–481.

We do not read *Communications Workers* as enunciating any new principles limiting the permissible scope of agency orders, or as holding that a broad order is justified only if the record discloses a "generalized scheme" of law violation. On the contrary, the case merely applied the principles previously announced in *National Labor Relations Board* v. *Express Pub. Co.*, 312 U.S. 426, to the particular facts there involved.

The local represented only members of Ohio Consolidated (Petitioners' Brief, No. 418, O.T., 1959, p. 4). The relations between a single employer and the union representing its employees are sufficiently unique to prevent proof of misconduct during a single strike against one employer from laying the foundation for an inference that the same unfair labor practices might be repeated against another employer unless enjoined. The national union had participated only indirectly in the illegal acts committed during the strike; it was held responsible only because it had "approved and financially supported" the "strike action of the Local" (Record, No. 418, O.T., 1959, p. 12). In these circumstances, the absence of any "generalized scheme" by the national to engage in similar illegal activities "against all telephone employers" made the broad order unjustified and unnecessary. For such an order inevitably would have had a serious inhibiting effect, in the sensitive area of labor relations, upon the activities of a national union which had

approximately 260,000 members and 730 locals, and represented the employees of approximately 100 employers throughout this country and Canada (Pet. Br., No. 418, O.T., 1959, pp. 3–4); and there was nothing to show any need for extending protection against coercion to employees of all other employers with which the national might deal.

In the instant case, however, as we have shown, an order that merely prohibits illegal brokerage on sales by Broch for Canada Foods to Smucker would not adequately protect the public interest. The broader order entered by the Commission operates in a narrow area of anticompetitive conduct specifically outlawed by Congress, namely, the illegal payment or allowance of brokerage by a seller's broker. There was nothing peculiar to the relations between Canada Foods, Smucker and respondent which impairs the natural inference that respondent, having made an illegal allowance in dealing with them, was ready to grant the same competitive advantage to other large buyers. The broader order is both justified and necessary.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded to enter a judgment affirming the order of the Commission.

Respectfully submitted.

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SEPTEMBER 1961.

APPENDIX

BROCH'S STATEMENT OF THE ISSUES PRIOR TO THE REMAND

Before the Federal Trade Commission

***Appeal Brief* (R. 5-6):**

QUESTIONS PRESENTED

* * * * *

The basic legal questions before the Commission are:

(1) Whether Section 2(c)'s ban on commissions by a seller "to the *other party*" or the intermediary of the *other "party"* also imposes a liability on an independent seller's broker.

(2) Whether an independent broker's acquiescence in a smaller commission at the seller's behest can be deemed a "*payment to*" *the "other party"* in the transaction *by the broker.*

(3) Whether an outright price reduction not directly related to a given brokerage commission in conception or size nevertheless constitutes an allowance "in lieu of brokerage."

(4) Whether the paramount public interest is fostered by a formal proceeding based on an isolated transaction of *de minimis* scope generating a purely private grievance between a respondent and a disgruntled rival; and whether it is in the public interest to construe the Brokerage Clause to inhibit price bargaining by creating a privileged sanctuary for broker-

age commissions sheltered by law from the normal competitive stresses of the market.

Before the Court of Appeals

Petition for Review (O.R. 214–215):

GROUNDS FOR RELIEF

Petitioner's request for judicial relief is based on the grounds that:

1. The Commission erred in its interpretation and application of Section 2(c) of the amended Clayton Act.

2. The Commission misconstrued Section 2(c) of the amended Clayton Act so as to unlawfully conflict with the objectives of antitrust policy expressed in the Sherman Act.

3. The Commission's construction of Section 2(c) of the amended Clayton Act violates the Fifth Amendment of the Constitution of the United States in that it arbitrarily denies petitioner the opportunity of competing for business and otherwise discriminates against it and hence deprives it of valuable property rights without due process of law.

4. The Commission's interpretation of Section 2(c) of the amended Clayton Act is contrary both to the intent of Congress as expressed in the legislative history and to the general public interest.

5. The inferences drawn by the Commission based upon the facts of record are erroneous in fact and law.

6. There is no substantial evidence of record which supports the Commission's rulings.

7. The order of the Commission is defective in that it is vague, exceeds the statutory limits of Section 2(c), and as applied would conflict with the Sherman Act.

RELIEF PRAYED

Wherefore, petitioner prays that this Court review the action of the Federal Trade Commission, enter a decree setting aside the agency's findings, conclusions, and order issued on December 10, 1957, as well as directing the Commission to dismiss its complaint against petitioner, and to award such further or alternative relief as the Court may deem equitable and just.

Brief (pp. 9–10)

CONTESTED ISSUES

1. Does Section 2(c) of the amended Clayton Act guarantee permanently fixed rates of commission to brokers which may not be reduced by the seller principal when compelled to lower the price of his goods to a buyer in order not to lose a sale.

2. May the Federal Trade Commission interpret Section 2(c) of the amended Clayton Act to impose unconditional liability on an independent broker for an open price reduction by the seller accompanied by a reduction in brokerage commission.

3. May the Federal Trade Commission interpret Section 2(c) of the amended Clayton Act to foreclose all opportunity to demonstrate that the seller's price to the buyer did not reflect or represent an allowance "in lieu of brokerage."

4. May the Federal Trade Commission bypass Section 2(a) of the amended Clayton Act by proceeding against an open price reduction under Section 2(c) which obviates proof of injury to competition and denies the affirmative legal defenses afforded a respondent in a Section 2(a) case.

5. May the Federal Trade Commission nullify Section 2(a) of the amended Clayton Act by proceeding under Section 2(c) to pro-

hibit price differentials which are justifiable and allowable under Section 2(a).

6. May the Federal Trade Commission interpret the Robinson-Patman Act to give rise to price rigidity and uniformity in open conflict with the national antitrust policy and the interest of the consuming public in lower food prices.

7. Is the public interest served by a formal proceeding based on a transaction of *de minimis* dimensions.

8. May the Federal Trade Commission allow its process to be used to further the private interest of a private person.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 74

FEDERAL TRADE COMMISSION, *Petitioner*

v.

HENRY BROCH & COMPANY, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

PRELIMINARY STATEMENT

This case lays open the current practice of the Federal Trade Commission in Robinson-Patman Act cases to issue blanket orders to cease and desist in the broad words of the statute, which perpetually enjoin the respondent to obey a vague statutory provision, on pain of contempt or penalty proceedings, without providing any guideposts for compliance beyond the perplexing text of the statute itself.

As exemplified by this case, such enigmatic orders not only compel the respondent to compete at his peril, but inevitably shift to the courts in enforcement proceedings the agency's duty to apprise respondents how to conduct their business in compliance with the law.

OPINION BELOW

The order of the Court of Appeals on remand, modifying and affirming as modified the order to cease and desist, is reported at 285 F.2d 764 (1960).

QUESTION PRESENTED

Section 11 of the Clayton Act as amended, 15 U.S.C. § 21 (1958), authorizes the Federal Trade Commission, after due administrative notice and hearings, to adjudge violations of the substantive prohibitions of the Act, including Section 2(c)'s ban on illicit brokerage transactions, and to issue orders "to cease and desist from such violations" found. Section 11 also provides that any party subject to an order to cease and desist may petition for review by a Court of Appeals, which thereupon shall have "jurisdiction to affirm, set aside, or modify the order of the Commission * * *."

In the instant case, a Commission complaint, advancing a legal theory of first impression, charged that one specific transaction by respondent on behalf of a particular seller with a particular buyer constituted an illicit brokerage payment in violation of Section 2(c). At the close of its administrative proceeding which was contested by respondent at every stage, the Commission issued an order to cease and desist which not only enjoined respondent from the same or related acts, but sweepingly enjoined respond-

ent from violating Section 2(c) with respect to "*any*" seller or "*any*" buyer and in "*any other manner*."[1]

Upon remand from this Court's decision on the merits reversing the Court of Appeals' interpretation of Section 2(c), the Court of Appeals denied respondent's motion to set aside or modify the order to cease and desist or to remand for further administrative reconsideration by the Commission, which was answered by the FTC's request for summary affirmance of the order. *Sua sponte*, however, the court below granted partial relief by limiting the application of the order, as affirmed, to brokerage transactions among the parties implicated by the evidence adduced at the administrative hearing.

Accordingly, the question presented is whether the Court of Appeals on remand abused its statutory

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[1] *In haec verba*, the order prohibits respondent "in connection with the sale of food or food products for Canada Foods Ltd., or *any other seller principal*," from "(1) Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to *any other buyer*, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer any allowance or discount in lieu of brokerage, or any [illegible] percentage thereof, by selling any food or food [illegible] such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage service; *or* (2) *In any other manner*, paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, or to *any other buyer*, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, *any* sale of food or food products to such buyer for its own account." 69 F.R. 202, 204-205. Emphasis added.

powers of review by modifying a blanket order to cease and desist arising out of a narrow and sharply contested administrative proceeding—in light of the law of the case as enunciated by this Court's decision on the merits, and in view of the Commission's refusal to reconsider or justify the basis for its order.

STATEMENT

From the outset, this case concerned *solely* respondent's actions as a broker in negotiating sales of apple concentrate on behalf of one seller-principal, Canada Foods, Ltd., with one buyer, the J. M. Smucker Company.

After investigating respondent's files and business records, the Commission discovered only one transaction raising legal questions under Section 2(*c*) of the Robinson-Patman Act (O.R. 21-24), which became the basis of its formal complaint. (O.R. 3) As issued, the complaint charged respondent with a violation of Section 2(*c*) by having "granted and allowed a buyer a certain percentage, approximately 60 percent, of the brokerage fee or commission paid by the seller-principal for services by respondents in connection with such sale" in 1954. (O.R. 3) After detailing the circumstances of this one transaction, the complaint specified that "This transaction in the conduct of respondents' business is challenged by the complaint herein." (O.R. 4) With respect to respondent's remaining business on behalf of twenty-five other seller-principals, the complaint stated that "This phase of said respondents' business is not challenged * * * herein." (O.R. 3)

At all times, respondent contested the Commission's charges—including the filing of pleadings, presenting

of evidence and appealing adverse rulings up to this Court.

Specifically, respondent filed Proposed Findings of Fact, Conclusions of Law, and Order with the FTC hearing examiner. (O.R. 169) Respondent maintained that his acceptance of a 3% rather than 5% commission was based on the economies of handling this "unusually large" order which permitted him to make more than on a number of small orders, and also that "there were definite savings to the seller in the handling and processing of such a large order." (O.R. 170, 172) Moreover, respondent stressed the disparities in the brokerage rates paid by the seller, and showed that his own commissions varied from 1% to 5%, sometimes fluctuating "according to volume and selling price of products." (O.R. 22, 189) Accordingly, respondent requested entry of an order dismissing the Commission's complaint. (O.R. 173)

Rejecting respondent's proposed findings, conclusions and order, the FTC hearing examiner filed an Initial Decision which adjudged a violation of Section 2(c) based solely on respondent's "dropping of commission on sales to a single purchaser," *i.e.*, the Canada Foods/Smucker transaction. (O.R. 199-200) The Initial Decision thereupon entered a blanket order to cease and desist, which perpetually enjoined respondent from violating Section 2(c) with respect to *any* seller and *any* buyer in *any* manner.[2] In effect, paragraph 1 of the order barred respondent from ever accepting a smaller rate of commission at the same time as the seller lowers his price to the buyer. Paragraph 2 barred respondent from ever violating the

[2] For text of order, see note 1 *supra*.

statutory provision in "any other manner." (O.R. 202)

Respondent "appealed" the hearing examiner's Initial Decision to the full Commission, pursuant to the FTC's Rules of Practice.[3] Respondent contested the Initial Decision by reference to "basic legal questions" including the "public interest" aspects of "a formal proceeding based on an isolated transaction of *de minimis* scope" (R. 6), maintained that no Section 2(c) violation could arise from price reductions based on cost and competitive factors (R. 14-15), and challenged the "law of this case" holding brokers' commissions "immune from adjustment in the course of negotiations." (R. 18) Finally, respondent pointed to the conflict with overall antitrust policy created by such a "freeze" on brokerage rates, stressing that "Section 11 of the Clayton Act expressly declares that no Commission order 'shall in any wise relieve or absolve any person from any liability under the antitrust Acts.'" (R. 19)

Rejecting respondent's appeal from the Initial Decision and Order, the Commission adopted the hearing examiner's findings, conclusions and order to cease and desist. (O.R. 204-211) In its opinion as well as in paragraph 1 of its order, the Commission treated respondent's lower rate of commission on the occasion of the seller's contemporaneous price reduction as tantamount to an illicit payment of brokerage by re-

[3] The Commission's rules at that time required no filing of "exceptions" as per the practice before the National Labor Relations Board detailed by its brief in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. 37, this Term, pp. 3, 27-29, and *now* contained in the Federal Trade Commission Rules of Practice as revised this year. 3 CCH Trade Reg. Rep. ¶9821.23 (1961).

spondent in violation of Section 2(c) (O.R. 209), and held immaterial any cost or competitive considerations bearing on the legality of the seller's price. (O.R. 210)

Respondent declined compliance with the Commission's order, and filed a Petition to Review and Set Aside Order of the Federal Trade Commission in the Court of Appeals. (O.R. 211-212) This petition challenged the Commission's application of Section 2(c), the factual and legal basis of its rulings, and concluded that "The order of the Commission is defective in that it is vague, exceeds the statutory limits of Section 2(c), and as applied would conflict with the Sherman Act." (O.R. 214)

The Court of Appeals unanimously set aside the Commission's order,[4] holding Section 2(c) inapplicable to independent sellers' brokers such as respondent, and concluding that no illicit brokerage payment resulted from the reduction in respondent's brokerage commission contemporaneous with the seller's price reduction. (O.R. 222-224) 261 F.2d 725. Also, noting that the FTC "did not proceed against the buyer or the seller," the court expressed doubt as to the public interest of proceeding against a "private grievance between rival brokers," and observed that

> "The effect of respondent's order is that the commissions of a seller's broker are rendered immune

[4] In its briefs, respondent reiterated its prior contentions, stressed the incompatibility of the sweeping ban of the order with the Federal Trade Commission's qualified rationalization of the scope of Section 2(c) (Reply Br., pp. 7-8), pointed to the isolated nature of the transaction at issue (Br., p. 30; Reply Br., p. 7), and attacked the "Commission's novel statutory interpretation, apparent from the face of its order." (Reply Br., p. 16) Respondent specifically noted the order's broad prohibition on price reductions to "any other buyer." (Reply Br., p. 7)

> from reduction by the seller when it is negotiating for the sale of its food products, and hence such a reduction, when used as a basis for quotation of a lower price, is illegal." (O.R. 223)

By a 5:4 decision on June 6, 1960, this Court reversed the statutory interpretation of Section 2(c) by the court below, 363 U.S. 166, and remanded for further proceedings consistent with the opinion. In the face of a dissenting opinion by four Justices which expressed concern that "all legitimate commission rates are frozen in destruction of competition, and in actual violation of the antitrust laws," 363 U.S. at 180, the majority opinion stressed the precise focus of its holding:

> "This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance 'in lieu' of brokerage has been granted. As the Commission itself has made clear, whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case." *Id.* at 175-176.

The majority also cautioned that the "seller and his broker can of course agree on any brokerage fee that they wish," *id.* at 170, and disclaimed "an absolute rule that § 2(c) is violated by the passing on of savings in broker's commissions to direct buyers, for here, as we have emphasized, the 'savings' in brokerage were passed on to a single buyer who was not shown in any way to have deserved favored treatment." *Id.* at 177 n. 19. Moreover, the majority opinion observed that

> "There is no evidence that the buyer rendered any services to the seller or to the [broker] nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced

brokerage charge. We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances." *Id.* at 173.

Following the remand, respondent requested the Court of Appeals, *inter alia*, to modify the cease and desist order, or to remand to the Commission for its further administrative consideration, since this Court's opinion demonstrated that there was "no proper foundation for the Commission's order to cease and desist." (R. 25) Respondent's motion emphasized the conflict with this Court's opinion created by the broadside prohibition of the FTC's order on brokerage transactions by respondent on behalf of *all* sellers with *all* buyers in *any manner*, in disregard of the cost and other circumstances stressed by this Court's opinion as potentially creating "quite a different case." (R. 25-26) Respondent also cited this Court's supervening decision in *Communications Workers of America* v. *National Labor Relations Board*, 362 U.S. 479, 481 (1960), which modified a sweeping Labor Board order in the absence of any "generalized scheme" of illicit activity to support an omnibus injunction reaching conduct toward "any other employer." (R. 26-27) Respondent twice suggested the alternative of a remand to the FTC for any further appropriate administrative consideration. (R. 29, 49-50) [5]

Disputing the Court of Appeals' *power to entertain* respondent's contentions, and without reconsidering or

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[5] Respondent stated that "If the Court should conclude that the issues tendered * * * were not sufficiently explored by the Commission at the administrative level, the proper course would be to remand to the Commission for further appropriate consideration, rather than to foreclose all opportunity for a ruling on the merits." (R. 49-50)

even explaining the basis of its order, the FTC twice requested summary affirmance.[6] The Court of Appeals denied respondent's motion, but *sua sponte* modified the order so as to delete its references to "any other" sellers or buyers, and thereupon entered a decree of affirmance. (R. 51-52) 285 F.2d 764.[7]

SUMMARY OF ARGUMENT

After a sharply contested administrative hearing about one arrangement by respondent in negotiating a sale of apple concentrate on behalf of one particular seller principal with one particular buyer, which gave rise to a legal issue of first impression under Section 2(c) of the Robinson-Patman Act, the FTC entered a blanket order perpetually enjoining respondent from ever violating Section 2(c) with respect to any other sellers and buyers and in any manner whatsoever. Upon remand from this Court's decision on the merits in 1960, which exposed important deficiencies in the FTC's unqualified order, the Court of Appeals partially modified the order by confining its application to transactions among the parties implicated by the record, in the absence of any justification by the FTC for the sweeping nature of its prohibition.

Without appropriate modification, the order would jeopardize respondent's entire business. It would not

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[6] See R. 35-37 and also the Commission's Memorandum in Opposition to Petitioner's Motion to File Reply to Respondent's Answer, dated Nov. 2, 1960, pp. 4-5.

[7] Contrary to the Commission's brief, the court below did not grant "precisely the relief sought by Broch's motion to modify" (Br., p. 8), since the modified order exposes all Canada Foods' Smucker transactions by respondent to unqualified prohibitions ignoring cost and other considerations which could establish their legality under the criteria of this Court's opinion. See Note, 45 Minn. L. Rev. 659, 668 n. 43 (1961).

only bar reductions in respondent's rate of commission made competively to gain a particular buyer's account, but would also outlaw any permanent arrangement whereby respondent accepted a smaller rate of commission on sales in which the seller quotes a lower price to the buyer. Although the seller's lower price might be entirely lawful, respondent would nonetheless stand in violation of the order. The order would also prohibit arrangements with any buyer even though he "rendered any services to the seller or to the respondent" or whose "method of dealing" warranted a reduction in the brokerage charge—"circumstances" which this Court's opinion excepted as presenting "quite a different case." Further, as originally issued by the FTC, the order omits the statutory exception of payments made "for services rendered," and could even reach uniform reductions in respondent's brokerage fee *in the absence of any discrimination among buyers*—a liability which this Court's opinion characterized as "absurd."

Judicial modification of blanket and factually unsupported orders in no way usurps the FTC's initial responsibility for fashioning orders to cease and desist, but rather implements the reviewing court's obligation to supervise orders which ultimately become orders of the court itself. Section 11 of the Clayton Act expressly grants Courts of Appeals "jurisdiction to affirm, set aside, or modify" orders of the Federal Trade Commission upon review. In short, the partial modification of the instant order by the Court of Appeals comports with conventional principles governing judicial review of FTC orders, and does no more than relate the terms of the order to the scope of the administrative proceeding.

While blanket orders *might* be appropriate if violations are not contested or amount to a "generalized scheme" of misconduct, orders should normally follow the nature of the pricing practices found unlawful—lest the Commission shift its duty of informing respondents how to comply with the law to the courts in enforcement proceedings, while forcing respondents to compete at their peril.

Wholly apart from the undoubted power of supervision vested in the Courts of Appeals to modify unduly broad orders, on the record in this case there can be no claim that respondent was precluded from urging modification of the order by reason of lack of a so-called "particularized objection." Not only did respondent challenge the premises behind the order at every step of this proceeding, but the Commission admits that it did in fact "address itself to the scope of" the instant order, and indeed declined further opportunities to do so.

Actually, even in the absence of prior specific objection to the scope of the order at the administrative level, reviewing courts in contested proceedings have often revised unjustifiably broad orders—as the Commission now admits.

ARGUMENT

A. The Commission's Blanket Order Far Exceeds the Narrow Compass of This Case, and Jeopardizes Respondent's Entire Business.

As fashioned by the FTC, the order perpetually enjoins respondent from in any manner violating the Brokerage Clause with respect to any *seller* and any *buyer*, even though the sole controversy here concerned one particular seller/buyer transaction. Indeed, the complaint affirmatively excepted respondent's business with his twenty-five other seller-principals (O.R. 3).

accentuating that *no other* aspect of respondent's business with anyone else raised any legal questions under the Act. Lest any doubt exist on this score, testimony by a Commission representative *disproved* any other possible violation beyond the single Canada Foods Smucker price-commission arrangement which was ultimately adjudged violative of Section 2(c). (O.R. 20-21, 24)

The universal sweep of the order respecting transactions with any other sellers and any other buyers is compounded by its further unqualified ban on conduct beyond the scope of the Act as construed by this Court. As detailed above, the sole controversy in this case related to respondent's conduct in a single seller buyer transaction by accepting a smaller rate of commission when the seller lowered his price to this one buyer. This Court's opinion on the merits carefully disclaimed any "absolute rule that § 2(c) is violated by the passing on of savings in broker's commissions to direct buyers, for here, as we have emphasized, the 'savings' in brokerage were passed on to a single buyer who was not shown in any way to have deserved favored treatment." 363 U.S. at 177 n. 19.

The FTC's blanket order defeats those assurances.

Paragraph 1 not only bars a commission reduction made *ad hoc* to gain a buyer's account, but also outlaws any *permanent* arrangement whereby respondent accepts a smaller rate of commission on larger sales in which the seller quotes a lower price to the buyer. Although the seller's lower price might be fully justified by cost savings or otherwise within the legal requirements of the Act, respondent would nonetheless stand in violation of the order. On top of this, the

order would also prohibit arrangements with any buyer even though he "rendered any services to the seller or to the respondent" or whose "method of dealing" warranted a reduction in the brokerage charge—the very "circumstances" which this Court excepted as presenting "quite a different case." 363 U.S. at 173.

Nor are these the only vices of the order. Still greater perils are posed by paragraph 2 which simply enjoins Section 2(c) violations "in any other manner." This paragraph not only omits the statutory exception of payments made "for services rendered," but exposes respondent to pains and penalties for any other activities transgressing this notoriously obscure proscription. In light of the Commission's consistent ban on the reflection of brokerage reductions in the form of lower prices,* this prohibition could reach even a uniform reduction in his broker's fee *in the absence of any discrimination among buyers*—a liability which this Court's opinion deemed "absurd." 363 U.S. at 176.

Nor is respondent's jeopardy dispelled by the Commission brief's equivocal hints (Br., p. 30 n. 13) that the order may not really mean what it says. Respondent can surely derive no comfort from ambiguous as-

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* *E.g., Howard E. Jones & Co.*, 31 F.T.C. 1538 (1940); *Glover & Wilson*, 39 F.T.C. 485 (1944); *G. B. Shelton Brokerage Co.*, 42 F.T.C. 114 (1946); *C. C. Waddill Co.*, 42 F.T.C. 125 (1946); *Phillips Sales Co.*, 42 F.T.C. 132 (1946); *Paul Pankey & Co.*, 42 F.T.C. 148 (1946); *William R. Hill & Co.*, 42 F.T.C. 173 (1946); *Southern California Fish Corp.*, 42 F.T.C. 180 (1946); *Del Mar Canning Co.*, 42 F.T.C. 188 (1946); *Horden Food Products Corp.*, 42 F.T.C. 196 (1946); *Sebastian-Stuart Fish Co.*, 42 F.T.C. 202 (1946); *Custom House Packing Corp.*, 43 F.T.C. 164 (1946); *Haines City Citrus Growers Ass'n*, Dkt. No. 7144 (June 29, 1960).

surances as to any special meaning of "the order in its relation to the circumstances of this case" (Br., p. 30 n. 13), which are belied, for example, by Commission decisions holding that discrimination is *not* necessary to make out a Brokerage Clause violation. *E.g., Venus Foods, Inc.*, Dkt. No. 7212, p. 8 (Oct. 28, 1960). Nor can respondent rely on elusive guarantees that "there is nothing in the order indicating that any such circumstances * * * [as the buyer's performance of services ordinarily performed by the broker], to the extent they might be relevant, would not be considered in determining whether the order had been violated" (Br., p. 31 n. 13)—for such buyer services are regularly ruled out as immaterial in Section 2(c) proceedings. *E.g., Southgate Brokerage Co.* v. *Federal Trade Commission*, 150 F.2d 607 (4th Cir. 1945), *cert. denied*, 326 U.S. 774 (1945).

Actually, the Commission brief's *ad hoc* qualifications only document the basic vice of vague and sweeping FTC orders, whose meaning recedes as they approach judicial review. To be sure, respondent might contest an enforcement proceeding by reference to this Court's opinion as a gloss on the order. But this potential defense in enforcement proceedings does not significantly alter the "material difference between enjoined and non-enjoined * * * activities." *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 388 (1945). Above all, as this Court has cautioned, such bifocal orders inevitably "shift to the courts a responsibility in enforcement proceedings" of resolving "issues which Congress has primarily entrusted to the Commission." *Federal*

Trade Commission v. *Morton Salt Co.*, 334 U.S. 37, 54 (1948).[9]

In all events,

> "A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court. Nor should he be ordered to desist from more on the theory that he may violate the literal language and then defend by resort to the Board's construction of it. Courts' orders are not to be trifled with, nor should they invite litigation as to their meaning. It will occur often enough when every reasonable effort is made to avoid it. Where, as here, the literal language of the order goes beyond what the Board admits was intended, correction should be made." *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 341 (1944).[10]

As this record shows, respondent's perils under the order are not fanciful but real. The evidence discloses transactions by respondent varying his commission rates with price and quantity (O.R. 22, 189), which might contravene the flat ban of the order. The order also penalizes respondent's future representation of Canada Foods in sales to Smucker, since respondent's 3% commission arrangements are outlawed irrespective of cost or any other justification which could hereafter support a lower price by the

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[9] For similar recent judicial criticism of FTC orders, see *Swance Paper Corp.* v. *Federal Trade Commission*, 291 F.2d 833, 838 (2d Cir. 1961); *Asheville Tobacco Board of Trade, Inc.* v. *Federal Trade Commission*, 1961 CCH Trade Cases ¶70,113, p. 75,387 (4th Cir. Sept. 20, 1961).

[10] During oral argument in one case, this Court directed FTC counsel "to submit a statement on behalf of the Commission setting forth its view as to the scope of the disputed paragraph of the cease and desist order," which was then incorporated in the Court's opinion. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 426 n. 5, 431 (1957).

seller to Smucker.[11] Notably, the very provisions of paragraph 2 of the order recently caused a criminal contempt conviction of another food broker, charged with granting a price reduction to a buyer. *In re Whitney & Co.*, 273 F.2d 211 (9th Cir. 1959).

Basically, the FTC order jeopardizes respondent's entire brokerage business. A seller-principal wishing to lower its price to a particular account and correspondingly to reduce his broker's commission can safely make such a deal by switching to a *new* broker—but not with respondent. For under the order's constraints, respondent is barred from accepting a lower commission when the seller lowers his price, and cannot even meet competitive fee arrangements which take away his business.[12]

There is, of course, no doubt that the Commission need not "confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).[13] For "those caught violating the Act must expect some fencing in." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431 (1957); *cf. Federal Trade Commission* v. *Mandel Brothers*,

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[11] See Note, 45 Minn. L. Rev. 659, 668 n. 43 (1961).

[12] The Commission takes the position that the meeting of competition is not a defense for a respondent under the Brokerage Clause. (O.R. 210).

[13] A principle consistently followed by the court below. *Eg., E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F.2d 152, 156 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958); and most recently, *Wilson & Co.* v. *Benson*, 286 F.2d 891, 896 (7th Cir. 1961).

Inc., 359 U.S. 385, 393 (1959) ("prophylactic and preventive measure" permissible in view of "extensive" and "substantial" violations.)

But, as this Court has emphasized, the Commission's orders should be "specifically aimed at the pricing practices found unlawful." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 52 (1948). Particularly in the sphere of competition is it imperative "that the decree be as specific as possible, not only in the core of its relief, but in its outward limits, so that parties may know their duties and unintended contempts may not occur." *International Salt Co.* v. *United States*, 332 U.S. 392, 400 (1947). Above all, the fact that a violation of law has been adjudged "does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 435-436 (1941); *cf. Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 409-410 (1945).

Indeed, "Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).[14] It surely mocks the FTC's "special competence" to promulgate sweeping and universal orders which merely paraphrase

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[14] In *Ruberoid*, the Court permitted the implicit inclusion in FTC orders of the *specific* statutory provisos, without sanctioning blanket prohibitions of obscure meaning.

Section 2(c)'s text, and then shift to the courts the task of fathoming their meaning.[15]

B. The Partial Modification of the Order by the Court of Appeals, Conforming With Judicial Precedents, Reconciles Fairness With Enforcement Efficiency.[16]

Upon this Court's remand for further proceedings consonant with its opinion on the merits, the Court of Appeals modified one dimension of the order but affirmed the other dimension intact.

Respondent's post-remand motion challenged the sweep of the order in light of this Court's disposition on the merits, in two distinct dimensions: (1) the order's *unqualified* prohibition of brokerage fee reductions coupled with lower prices, contrary to this Court's exception of such transactions based on legitimate cost and other considerations, and the opinion's insistence on arrangements productive of price discrimination favoring a particular buyer; and (2) the

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[15] See Report of the Attorney General's National Committee to Study the Antitrust Laws 169-170 (1955): "We recommend that the Commission devote serious effort to vindicate its expert administrative status through precision in the mandates its orders impose. • • • Such carefully formulated orders would achieve their legitimate task of terminating illegal discriminations, without unduly obstructing a seller's future flexibility in adjusting his prices to business developments—a process essential to effective functioning of a free market economy." See also H. R. Rep. No. 580, 86th Cong., 1st Sess. 6 (1959), considering the recently amended enforcement provisions of the Clayton Act, and admonishing the FTC to "make a continuous effort to issue orders that are as definitive as possible."

[16] Respondent's motion alternatively requested the Court of Appeals to remand the case to the Commission for its reconsideration of the order (R. 29, 49-50), but such action was stymied by the Commission's request for summary judicial affirmance of the order's original text. (R. 37) See note 6 *supra*.

order's *universal* reach to brokerage transactions involving *any seller* and *any buyer*, notwithstanding the narrow compass of this case confined to respondent's Canada Foods/Smucker transaction.

The Court of Appeals' modification only limited the order's second dimension, but affirmed the broad and unqualified prohibition on respondent's transactions with Smucker on behalf of Canada Foods.[17]

The court's partial modification properly confined the injunction to the controversy and findings at bar—in the absence of any explanation or justification by the FTC for the unqualified sweep of its order. At no time did the Commission condemn or even question any transaction by respondent other than his fee reduction upon Canada Foods' lower prices to Smucker, and an examination of respondent's books by Commission representatives disclosed no trace of any other possible dereliction. (O.R. 21, 24)[18] Moreover, the *single* arrangement ultimately adjudged unlawful occurred in a

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[17] Compare *Swance Paper Corp.* v. *Federal Trade Commission*, 291 F.2d 833, 838 (2d Cir. 1961) (judicial modification of broad order in language of Section 2(d) so as to confine it to the *specific promotional practice* found to violate the statute, although reaching transactions with all competing customers). *Swance* was recently followed by one Initial Decision limiting the Section 2(d) order to the same *specific promotional practice*, and with respect to the *single product* cat food in a diversified seller's line. *Quaker Oats Co.*, Dkt. No. 8119 (Sept. 8, 1961).

[18] Counsel's conjectural rationalizations for the order in their brief (pp. 31-37), not only highlight the striking lack of any prior explanation by the FTC, but are contrary to the evidence which affirmatively *refutes* any asserted "willfulness of the violation" or claim that "the particular violation found was not unique or limited to Broch's dealings with Canada Foods and Smucker, but was of a kind likely to be repeated in other transactions if not prohibited." Compare FTC Br., p. 32, with FTC testimony at O.R. 19-21.

borderland area of the law which pitted the Justice Department against the FTC,[19] and ultimately produced a 5:4 decision by this Court.

The Court of Appeals' partial modification of the order accords with judicial precedent as well as with the FTC's own prior orders in Robinson-Patman Act cases.

In *Communications Workers of America* v. *National Labor Relations Board*, 362 U.S. 479 (1960), this Court unanimously held that a respondent could *not* be sweepingly ordered to cease and desist from violating the National Labor Relations Act as to a named employer and "any other employer," when the record disclosed no violation with respect to any but the named employer and there was no "generalized scheme" of illicit activity to support an omnibus prohibition. *Id.* at 481. Holding the agency without authority to issue such a blanket injunction in those circumstances, the Court accordingly modified the order by striking the words "or any other employer."

The *Communications Workers* rationale, rejecting blanket and *factually unsupported* administrative injunctions regulating a respondent's conduct towards all the world, has been applied by numerous appellate decisions modifying agency orders.[20] With seeming

[19] See Remarks of William C. Kern, Commissioner, Federal Trade Commission, before the Mechanical Contractors Associations of Texas, Inc., p. 9 (Jan. 14, 1961), disclosing that "The file was studied by the Antitrust Division, which concluded that the Court of Appeals was correct and the Commission was wrong, and it recommended that the Solicitor General not seek review by the Supreme Court."

[20] *E.g.*, *National Labor Relations Board* v. *Ochoa Fertilizer Corp., et al.*, 283 F.2d 26 (1st Cir. 1960); *National Labor Relations Board* v. *Brandman Iron Co.*, 281 F.2d 797 (6th Cir. 1960); *National Labor Relations Board* v. *Plumbers Local 176*, 280 F.2d 441 (1st Cir. 1960).

consent of the Labor Board,[21] this principle rejects cease and desist orders which sweepingly reach out *beyond the controversy and record* to enjoin activities relating to "any other" person.

Such limitations on the scope of administrative orders are as appropriate to FTC as to NLRB enforcement.[22] A chronic or "generalized scheme" of misconduct, whether flouting the labor or the trade regulation laws, may well warrant a broad prohibition to bar evasion or recidivism whose threat is inferable from the character of the past offense. In such cases of "utter disregard of law," justice and equity may well "call for repression by sterner measures than where the steps could reasonably have been though-

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[21] See *National Labor Relations Board* v. *Plumbers Local 476*, No. 39, O.T. 1961, Pet. p. 4 n. 3 (accepting modifications with respect to union misconduct toward "any other" primary employer.)

[22] The FTC brief's attempted distinction between orders against large labor unions and small business firms (Br., pp. 36-37) is spurious. The *Communications Workers* principle applies not only to limit injunctions against a "national union" having "participated only indirectly" in the violations (Br., p. 36), but *as applied by the NLRB* governs also small union locals directly responsible for the charged violation. See *National Labor Relations Board* v. *Plumbers Local 476*, No. 39, O.T. 1961, *supra* note 21.

Moreover, the record here *disproves* the asserted "natural inference" that respondent "was ready" to violate the law as to others, there being "nothing peculiar to the relations" among Canada Foods and Smucker (Br., p. 37), since he was *exonerated* of any possible violation other than the unique Canada Foods/Smucker transaction by the FTC itself (O.R. 21), and no possible other misconduct was ever hinted.

Indeed, to the extent *any* distinction in principle exists, a broad injunction is surely more necessary to protect the public from the threat of further illegal coercion by a powerful national union than from the perils of a small food broker's fee reduction in a sale of apple concentrate.

permissible." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 429 (1957); *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 89-90 (1950). See also *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 393 (1959) (more than 200 violations in "extensive" misconduct.) A broad injunction may also be appropriate if guilt is not contested, inviting a presumption that the full facts would have shown the violation in its most obnoxious cast. *E.g., Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952); compare *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 437-438 (1941).

But where, as here, the controversy concerned only an isolated arrangement in a close case, the order's limitation to trade actions with the implicated parties is no more restricted than the FTC's own past orders which have been confined to the implicated parties without reaching out to blanket "any others."[23]

[23] *E.g., Charles V. Herron*, 30 F.T.C. 445, 451 (1940); *Mississippi Sales Co.*, 30 F.T.C. 1282, 1297 (1940); *Rogers Parvin & Co.*, 28 F.T.C. 1429, 1444 (1939); *Quality Bakers of America*, 28 F.T.C. 1507, 1525 (1939); *American Oil Co.*, 29 F.T.C. 857, 866 (1939); *C. E. Anthony Co.*, 29 F.T.C. 922, 929 (1939), 30 F.T.C. 1103 (1940); *Fruit & Produce Exchange*, 30 F.T.C. 224, 233 (1939); *Golf Ball Mfrs.' Ass'n*, 26 F.T.C. 824, 850 (1938); *Webb Crawford Co.*, 27 F.T.C. 1099, 1116 (1938); *Oliver Brothers, Inc.*, 26 F.T.C. 200, 214 (1937).

Currently, however, the Commission is issuing blanket orders, in the words of Section 2(c) and of universal scope as to parties, as a matter of routine. Unlike the NLRB, which has adopted a policy of entering broad orders only in *particular* and *appropriate* cases, (see NLRB Brief, p. 9, in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. 37, O.T. 1961), the FTC issues broad orders wholesale and in bulk—as reflected in 45 such Section 2(c) orders issued in one day, May 19, 1961.

The undocumented claim that "a limited order would not effectively cure the ill effects of the illegal conduct" (FTC Br., p

What is more, the courts have marked out the proper scope of FTC injunctions as being "specifically aimed at the pricing practices found unlawful" so as to prevent "like and related acts," *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 52 (1948); *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392-393 (1959); and have disapproved vague prohibitions "in the very words of the statute" instead of "the particular practice found to violate the statute." *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F.2d 833, 838 (2d Cir. 1961); *cf.* also *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 455-456 (1922); *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 436-438 (1941); *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 388-392 (1945); *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 226 (1949).

Such limitations, which fit the order to the offense, safeguard the judiciary's restricted role in administrative law enforcement. The question is not whether a respondent should be left "free to commit similar violations" with others (FTC Br., p. 31)—for the FTC

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31) is also belied by Commission practice respecting orders under Section 5 of the Federal Trade Commission Act, which are typically confined to the particular practice found to violate the statute and the particular parties implicated by the record. See, *e.g.*, *Franklin Institute*, 55 F.T.C. 14, 16-17 (1958); *Holland Furnace Co.*, 55 F.T.C. 55, 90-91 (1958); *World Wide Brokerage Corp.*, 55 F.T.C. 97, 98-99 (1958); *Dundee Electronics Co.*, 55 F.T.C. 100, 101 (1958); *Bantam Books, Inc.*, 55 F.T.C. 779, 788 (1958); *Zoysia Farm Nurseries, Inc.*, 55 F.T.C. 803, 804-805 (1958); *Atlantic Sewing Stores, Inc.*, 54 F.T.C. 174, 180-181 (1957); *Morse Sales, Inc.*, 54 F.T.C. 193, 197 (1957); *Carl Co.*, 54 F.T.C. 243, 244-245 (1957); *Exposition Press, Inc.*, 54 F.T.C. 908, 910-912 (1958).

may prosecute any violations if they ever occur. Rather, blanket orders compel a respondent to conduct his business under judicial supervision in the shadow of contempt proceedings. *E.g., In re Whitney & Co.*, 273 F.2d 211 (9th Cir. 1959); *cf. May Department Stores Co. v. National Labor Relations Board*, 326 U.S. 376, 388 (1945); *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 341 (1944). In the end, such orders defeat "proper judicial administration," for "the duty of enforcing the prohibitions [of the Act as to respondent] is shifted from the Commission to the federal courts, which may in the future be forced to decide the very issues that Congress has entrusted the Commission to determine." *Swanee Paper Corp. v. Federal Trade Commission*, 291 F.2d 833, 838 (2d Cir. 1961), citing *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948); *Asheville Tobacco Board of Trade, Inc., v. Federal Trade Commission*, 1961 CCH Trade Cases ¶70, 113 (4th Cir. Sept. 20, 1961).

Above all, careful cease and desist orders by the FTC are imperative for the rational implementation of the Robinson-Patman Act.[24] The puzzling obscurities of this Act have been perceived by this Court, which has cautioned that its loose or undiscerning enforcement can easily overstep the Congressional intendment so as to thwart rather than to promote overall antitrust

[24] As noted by the Second Circuit's *Swanee* opinion, the recent reinforcement of Clayton Act sanctions governing FTC orders was coupled with a Congressional admonition to "make a continuous effort to issue orders that are as definitive as possible," and stressed the correction of their deficiencies on judicial review. 291 F.2d 833, 837 n. 4 (1961).

objectives. *E.g., Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 63, 65, 74 (1953).[25]

C. Since the FTC Had Full Opportunities to Consider the Scope of Its Order, the Court's Statutory Right to Modify Is Clear.

No controversy exists as to the principles of "orderly procedure and good administration" which accord administrative agencies the right to pass on objections to their rulings in the first instance, thus permitting the FTC to ply its "expertise" and to avert needless corrections on judicial review. (See FTC Brief, pp. 15-18 and cases cited.) This doctrine is premised on the desirability of the agency's initial expert evaluation of the issues before they are exposed to limited scrutiny by the courts. (*Ibid.*)

But here the FTC *did* consider its order in relation to its underlying findings, and actually passed up further opportunities for administrative consideration upon remand from this Court's decision on the merits. Admittedly the FTC "does address itself to the scope of a proposed order on appeal from the trial examiner's decision" irrespective of the respondent's contentions. (Br., p. 19) As a matter of fact, in "the present case the Commission concluded that the order recommended by the examiner was the proper

[25] For example, on May 19, 1961, the Commission simultaneously issued forty-five cease and desist orders in the broad text of the Brokerage Clause against members of the citrus fruit industry. The collective impact of these orders, which prohibit brokerage fee reduction or elimination, creates an industry-wide abolition of fee competition under Robinson-Patman aegis and policed by the courts—comparable to other industries' private arrangements prosecuted under the Sherman Act as undue restraints of trade. *E.g., United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485 (1950); *United States v. American Ass'n of Advertising Agencies, Inc.*, 1956 CCH Trade Cases ¶68, 252 (S.D. N.Y. 1956).

remedy." (*Ibid.*) When respondent's post-remand motion below *twice* suggested possible further administrative consideration of the order in light of this Court's opinion (R. 29, 49-50), the FTC countered with requests for the order's summary judicial affirmance. (R. 37) [26]

Having considered the scope of its challenged order, and having rejected further opportunities to do so, the FTC can hardly complain of any foreclosure of its procedural rights when the court below modified the order at the time of its affirmance.[27]

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[26] The untenable and extreme nature of the FTC's previous *challenge* to the Court of Appeals' *power* to entertain respondent's contentions is highlighted by the Solicitor General's brief, which now concedes the court's *right* to modify the order and only questions its exercise in light of the facts of this case. (Br., pp. 10, 15, 20) Actually, the first affirmative justification tendered for the FTC's order appears in the Solicitor General's brief on behalf of the Commission before this Court.

[27] Furthermore, the Commission itself was at all times free to revise its order after the remand if it so wished. See *Swance Paper Corp.* v. *Federal Trade Commission*, 291 F.2d 833, 838 (2d Cir. 1961). In other cases, the FTC has voluntarily revised its orders during judicial review, *e.g.*, *Maryland Baking Co.* v. *Federal Trade Commission*, 243 F.2d 716, 719 (4th Cir. 1957), including partial abandonment or revisions of an order during *this* Court's review. See *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396 (1958), Reply Brief for FTC, pp. 31-32; *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 393 (1959).

Its brief's attempted distinction of *Swance* by reference to the 1959 Clayton Act amendments, 15 U.S.C. § 21, (Br., p. 23 n. 8) is baseless, since prior thereto the Commission could also modify its own orders, before or after their presentation for judicial review. See FTC Rules of Practice, 16 C.F.R. § 3.27 (1960), and, *e.g.*, *National Biscuit Co.*, 50 F.T.C. 932 (1954).

Significantly, not a single case cited by the FTC brief on this point involved a situation where the agency, as here, both *could* and *did* give *prior* consideration to the aspect of a ruling which

Against this background, and in light of respondent's contest of the FTC's charges at every turn, the Commission's invocation of the "principle of exhaustion of administrative remedies" (Br., p. 17) is surely misplaced.

The Commission's decision and order was challenged throughout the administrative proceeding, and at each stage of judicial review. Respondent (1) denied the Commission's charges at the administrative level (O.R. 6); (2) submitted a proposed order of dismissal to the hearing examiner (O.R. 173); (3) appealed to the Commission from the examiner's initial decision and order (O.R. 203); (4) declined compliance with the Commission's order pending judicial review (O.R. 203, 211-212); and (5) filed a statutory petition praying that the order be set aside as defective, apart from the proceeding's substantive failings, because it was

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was revised by the reviewing court. In some, the respondent raised *no contest* whatsoever to the adverse ruling at the administrative level, *e.g.*, *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952); *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385 (1946); in others the respondent never tendered the particular issue to the agency for its consideration in any form, *either* before *or* during judicial review, *e.g.*, *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411 (1958); *National Labor Relations Board* v. *United Mine Workers*, 355 U.S. 453 (1958); *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1955); *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *National Labor Relations Board* v. *Enterprise Ass'n*, 285 F.2d 642 (2d Cir. 1960).

Compare also the Solicitor General's position in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. 37, O.T. 1961, Brief, p. 8, basing the right to judicial modification of Labor Board orders on the question of whether the Board "had considered the scope of the orders in the light of the evidence and findings of record before arriving at its ultimate decisions."

"vague, exceeds the statutory limits of Section 2(c), and as applied would conflict with the Sherman Act." (O.R. 214) [28] Subsequent to this Court's divided decision on the merits, which remanded the proceeding for further appropriate action, respondent once again contested the basis and scope of the order in light of the law of the case as enunciated by this Court. (R. 26, 49)

To be sure, respondent's post-remand motion in 1960 amplified the original challenge to the order once Section 2(c) had for the first time been interpreted by this Court. Tracing the conflict between the absolute and blanket prohibitions of the order and the law of the case as set forth by this Court's majority opinion, the motion also advanced the supervening legal development of this Court's *Communications Workers* decision in 1960 which modified an omnibus Labor Board order in the absence of a "generalized scheme" of dereliction.[29]

But for the FTC to claim inadequate "notice" on this record as to respondent's challenge to the order,

[28] Before the Court of Appeals, the briefs treated the impact of the FTC's order on competition in food distribution, as well as the Commission's preoccupation with a picayune and isolated transaction affecting only the particular parties involved. (See Pet. Br., pp. 27-33, Reply Br., pp. 7, 14-16) Respondent expressly contended, and the FTC disputed, that the sweeping terms of the original cease and desist order improperly barred normal competitive price reductions to *all* customers. (Reply Br., pp. 1, 7, 15; FTC Br., pp. 39-42)

[29] See also *Swance Paper Corp.* v. *Federal Trade Commission*, 291 F.2d 833 (2d Cir. 1961).

due to a missing so-called "particularized objection," (Br., p. 19) is to exalt sheerest technicality.[30]

Nor can lack of so-called "particularized objection" curtail a reviewing court's power to consider *supervening* circumstances which impugn an administrative order. For "When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428 (1947); *cf. Johnson* v. *Shaughnessy*, 336 U.S. 806, 818 (1949); *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941); *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538 (1941).

Finally, regardless of "particularized objection" at the administrative level, courts admittedly *can* and *do* direct the modification of orders which exceed the agency's "authority" (FTC Br., p. 21)[31]—whenever

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[30] Compare *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 386 n. 5 (1945). It is relevant in this connection that the FTC Rules of Practice at the time of this review did not require "exceptions" to hearing examiner's rulings, providing instead a generalized "appeal" procedure whereby the agency could "exercise all the powers which it could have exercised if it had made the initial decision." 16 C.F.R. § 3.24(a) (1960). To that extent, therefore, the FTC could give consideration to all issues presented by the examiner's rulings, regardless of any particularized "exceptions" (see FTC Br., p. 19), unlike NLRB practice where the Board *cannot* consider points unless *specifically raised in exceptions* to the examiner's findings. See Brief in *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, No. 37, this Term, pp. 10-12.

[31] Most recently, see *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F.2d 833, 838 (2d Cir. 1961). See also *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *Bork Mfg. Co.* v. *Federal Trade Commission*, 194 F.2d 611 (9th Cir.

the legal basis for the order is exposed as defective in the course of judicial review. Nor does it matter whether the modification follows express "reversal of the finding upon which the changed portion of the order rested" (FTC Br., p. 22 n. 7 and cases cited), or, as here, effectuates the law of the case when enunciated by the reviewing court. *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 226 (1949); *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 435-438 (1941); *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 455-456 (1922); *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F.2d 833, 838 (2d Cir. 1961).[32]

CONCLUSION

This Court recently observed that "One cannot generalize as to the proper scope of these orders. It depends on the facts of each case and a judgment as to the extent to which a particular violator should be

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1952); *R. J. Reynolds Tobacco Co.* v. *Federal Trade Commission*, 192 F.2d 535 (7th Cir. 1951); *Folds* v. *Federal Trade Commission*, 187 F.2d 658 (7th Cir. 1951); *Parker Pen Co.* v. *Federal Trade Commission*, 159 F.2d 509 (7th Cir. 1946); *Milk and Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F.2d 478 (7th Cir. 1946); *Gelb* v. *Federal Trade Commission*, 144 F.2d 580 (2d Cir. 1944); *Etablissements Rigaud, Inc.* v. *Federal Trade Commission*, 125 F.2d 590 (2d Cir. 1942); *Standard Container Mfgrs.' Ass'n* v. *Federal Trade Commission*, 119 F.2d 262 (5th Cir. 1941).

Contrary to the FTC brief (p. 22 n. 7), one aspect of the *Reynolds* order modification by the court had *not* been raised at the agency level.

[32] *None* of these cases reveals a specific challenge before the agency *to the aspect of its order modified by the court*. The Commission brief's understanding of the *Express Publishing* case (Br., p. 26 n. 12), to the extent it may differ, is inaccurate.

fenced in." *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392 (1959).

On the particular facts of *this* case, the partial modification of the Commission's blanket order by the Court of Appeals was obviously correct. In any event, the Court of Appeals did not abuse its statutory reviewing powers by modifying an order clearly exceeding the exigencies of this case—in the absence here of any "generalized scheme" of illicit activity to warrant an omnibus prohibition extending beyond the narrow violation which was ultimately found in a borderland area of Robinson-Patman jurisprudence.

Accordingly, the judgment below should be affirmed.

Respectfully submitted,

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